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MODERN ECONOMIC WARFARE
(LAW AND THE NAVAL PARTICIPANT)

By
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FOREWORD

Since the Naval War College was founded in 1884, the study of International Law has been an important part of its curriculum. From 1894 to 1900, certain lectures given on International Law together with the situations studied were compiled and printed, but with very limited distribution. Commencing in 1901, however, the first formal volume of the Naval War College's "Blue Book" series was published.

This book represents the fifty-sixth volume in the series as numbered for cataloging and reference purposes. The present volume is written by Professor Neill H. Alford, Jr. of the University of Virginia School of Law, who occupied the Chair of International Law at the Naval War College during the 1961-1962 academic year. It is considered that Professor Alford's book presents an excellent, informative, and comprehensive work in the field of economic warfare.

The opinions expressed in this volume are those of the author and are not necessarily those of the United States Navy or the Naval War College. The fact of publication does not imply endorsement of content but indicates merely that the subject treated is one which merits attention.

JOHN T. HAYWARD

Vice Admiral, U.S. Navy

President, Naval War College

PREFACE

The manuscript for this book was commenced in the spring of 1962 and substantially completed in the fall of 1964. Economic warfare and its political environment changes rapidly and parts of this book will certainly be obsolete before its publication. Strangely anachronistic references will be found to "Soviet" and "Sino-Soviet Blocs." These may have existed in 1962 but could hardly be said to exist today. The book was completed before the United States became heavily involved in Vietnam and reflects no substantial part of our experience there. The lengthy discussion of economic warfare with Cuba through sugar-market controls breaks off in 1962, although supervening events tend to bear out the writer's observations. National institutions for trade control have altered somewhat since the writer described them in Chapter II. All in all, a highly fluid area is difficult to write about, although the writer comforts himself with the hope that his basic analysis of economic warfare, the relation of this analysis to legal institutions, and the relation of both to naval decision making, may become increasingly relevant as relations between the United States, the Soviet Union, and Communist China continue their process of change.

Work on the book was commenced during the administration of Vice Admiral Bernard L. Austin, USN, as President of the Naval War College. Admiral Austin's intimate knowledge of naval decision making and interest in law proved stimulating to the writer during his year of Residence. The writer's thanks are also due to Vice Admiral Charles L. Melson, USN, and Vice Admiral John T. Hayward, USN, Presidents of the Naval War College, who have extended him its facilities and have shared infinite patience with his delays to which lawyers unfortunately are prone.

During his tenure at the Naval War College the writer profited greatly from his opportunities to discuss and argue points of international law of naval interest with Commander (now Captain) Charles R. Davis, USN, and is heavily indebted to a series of classes of officers at the Naval War College between 1962 and 1965 whose international legal problems are reflected in this book.

The burden of preparing the manuscript for publication and of

soliciting comments upon it has fallen upon Commander Henry S. Palau, USN, and Lieutenant Commander Joseph M. Battaglino, USN. It is sufficient to say that without their editorial help the book would never have been published.

The materials in substantially the form presented here were also submitted in partial fulfillment of the requirements for an advanced degree in law at the Yale Law School. In this connection, Professor Myres S. McDougal and Dr. B. S. Murty of the Yale Law School read the original manuscript and made many helpful suggestions. Dean Hardy Cross Dillard of the University of Virginia Law School has done much to encourage the writer to press forward with his work on this book and to seek its publication.

Two Elizabeth Alfords have been extremely patient with the writer as the book was in preparation and his gratitude to them is here acknowledged.

Responsibility for what appears in the book rests entirely upon the writer.

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INTRODUCTION

Modern economic warfare is "material resource" warfare. Modern economic warfare involves intentional disturbances of the flow of material resources among people and of the processes by which these resources are used to produce values. Under the rubric "modern economic warfare" are embraced such apparently disparate practices as the preemption of scientific knowledge and skill to deny them to an adversary and interferences with the transport of materials, such as nuclear and biological weapons, not regarded as wealth in a conventional sense. Traditionally, economic warfare has been associated with manipulations of *wealth* to affect *power*. But these manipulations are treated in this book as disturbances of processes by which resources are used to produce values through the medium of wealth.

Modern economic warfare is similar in its major features to economic warfare waged in the past. Differences stem from the fact that modern economic warfare is waged during a period of general military stalemate. This military stalemate is of uncertain duration. It is subject to intentional or inadvertent disturbances, being based upon a balance between major adversaries in arsenals of ultra-decisive weapons of a nuclear, biological and chemical nature.

Thus, when modern economic warfare is waged during insurgencies, counterinsurgencies and "limited" wars, coercive economic practices may escalate into violent power exchanges. When this escalation is not desired by the policy makers concerned, there is a premium upon selecting economic warfare techniques which reduce the risk of escalation to a minimum.

The writer seeks to demonstrate in Part I of this book that economic warfare by "protracted harassment," the usual posture of the United States and other major powers when employing economic coercion, has been rendered marginally effective, prohibitively costly and extremely hazardous by political and technical changes. He recommends, as an alternative to economic warfare by "protracted harassment," preference for economic warfare by "economic sortie." Economic warfare by "economic sortie" has been waged frequently and effectively in the past. It is adaptable to current "military stalemate" conditions whether or not employed concomitantly to limited military hostilities.

In Part II of this book, principles developed and discussed in

Part I are applied in a series of hypothetical cases in which naval officers participate in decision making, often simply in an advisory capacity, at various policy levels. The convenience of the casual reader has been sacrificed to realism by developing the hypotheticals in factual sequence. Consequently, a reader referring to a single hypothetical will perhaps find useful a review of the preceding fact situation.

Two islands (logical targets for economic warfare by sea) figure in the hypotheticals. These are Nueva and Antioka, adjacent and fictitious countries, placed in the Western Hemisphere only to involve in the discussions the Organization of American States. A map appears at the beginning of Part II and as Appendix A.

The situations commence with naval activity relating to a civil disturbance in Nueva in which property of United States citizens is threatened with loss. The situations then progress through a civil war in Nueva which results in overthrow of its government by the insurgents; strained relations between the new government in Nueva and Antioka; development of Nueva as a Scythian satellite, Scythia, also a fictitious state, appearing as a major political adversary of the United States; overthrow of the Antiokan government by Nueva with Scythian aid; and end with a series of hypotheticals in which the United States establishes a naval blockade of Antioka and Nueva and later participates in peace enforcement action against Antioka and Nueva by the Organization of American States under the Rio Pact.

The purpose of the book is to alert naval officers to the bearing of law upon economic warfare confrontations and to demonstrate to them how law relates to the discharge of their economic warfare duties. No economic warfare primer is attempted, although in concentrating upon decision making at low policy levels and in relating law to this process, the writer found useful a delineation of major principles of strategy and tactics in economic warfare. Other commentators, stressing either the use of economic warfare techniques to support military operations or the impact of economic warfare upon national economies, have not attempted this emphasis.

In hammering out his own provisional and crude framework of strategy and tactics in economic warfare, the writer is aware he has trampled upon niceties of economic theory with Gothic abandon. Perhaps those better equipped for the task will recognize the need for principles of economic warfare to guide executive officers at all levels of government and will provide a more workable and satisfactory analysis.

The use of naval power in economic warfare is familiar. Admiral

Mahan, in his classic *The Influence of Sea Power Upon History* * * * ¹ defined with infinite care the relationships between naval power and the distribution and use of material resources. Sharing with other 19th century thinkers the conviction that principles of growth, useful to explain the past and guide predictions of the future, could be discovered by a sophisticated and diligent analysis of value processes, Mahan related naval power to principles of *political change* discoverable in processes for producing and using material resources.

Whether "wealth" principles provide complete explanations of events in the past or sound guidelines for forecasts of the future are matters now hotly disputed. But, in addition to securing deserved recognition of the influence of navies in history, quite apart from their sporadic use in war to destroy the people and commerce of an enemy, Mahan articulated an enduring relationship between navies and the distribution and use of material resources. This relationship deserves attention when the United States Navy is considered as a force to execute a national policy of "graduated response to coercion."

However, Mahan's advocacy of the need for a revival of United States naval strength, which had fallen into desuetude in the late 19th century, led him to define the mission of a naval establishment primarily as one of trade protection. This was a modest demand, ably attuned to the trend of American thought and the changing political position of the United States.

Many Americans of Mahan's day questioned the necessity even for the feeble fleet then flying our flag. They shared, nevertheless, a pervasive belief that a major purpose of government was positive, but benign and unobtrusive, protection of private activity in producing, transporting and using wealth.

Sensitive to this opinion, and foreseeing a stimulus to American interest in sea trade following completion of the then contemplated Isthmian canal, Mahan accurately and effectively projected an image of the Navy as the indispensable protector of sea commerce. His arguments supported claims by the Navy to an increasing share of the national budget during the lean fiscal years preceding the Spanish-American War and during the period of almost equal general military impoverishment preceding World War I. Educated by Mahan to the intimate relationship between a powerful Navy and the peaceful maintenance and expansion of sea commerce, the American taxpayer bore his increasing financial burden with little complaint.

Influenced also by Mahan's definition of the purpose of a United States naval establishment, the Navy accepted the strategic and tactical concept of "organic" *operational* control advocated by Mahan

¹ Mahan, *The Influence of Sea Power Upon History, 1660-1783* (1890).

and a number of his contemporaries. "Organic" *administrative* control had prevailed in the Navy for many years. But many officers, particularly senior officers of Civil War vintage, adhered staunchly to the concept that the normal and proper employment of naval power was by the dispatch of individual cruisers for raids upon enemy commerce.² Mahan and others, who viewed the mission of the Navy principally as one of *protecting* sea carriers to and from American ports, saw centralized operational control as an essential institution to accomplish this end.

By the time of the Spanish-American War the "Mahan concept" was beginning to prevail. The flamboyant individualism of independent naval operators, such as Cushing, was on the wane. Efficient electronic communications sealed the victory of "organic" operational control.

Reasonably well-financed, in part at least as an outgrowth of Mahan's effective public appeal, the Navy kept abreast of improvements in naval hardware. Coupled with this was adherence to a new tactical and strategic concept which proved effectively geared to the requirements of major naval warfare in the early 20th century. During World War I, the protection of commerce, as Mahan had foreseen, was the dominant mission of the United States Navy; and although World War II imposed diverse requirements upon the Navy, commerce protection again demanded a significant part of its effort.

The nuclear age has reinforced the importance of "organic" operational control. But features of existing and potential military conflict in the nuclear age have revived a shadow of the old decentralized decision making familiar in the early period of Mahan's naval career. The more dramatic aspects of this current individualization of policy making inhere in such current naval functions as the use of naval units to strike, by means of aircraft or missiles, deep within continental land masses and the provision of second-strike capabilities by units at sea. Yet changes of greater subtlety also are occurring.

In the past, naval officers have figured in economic warfare most prominently while maintaining blockades, enforcing contraband lists and preventing unneutral service during general hostilities. During World Wars I and II, as will be pointed out in further detail in Chapter V, there was a shift in the responsibility for major economic warfare decision making from the sea officer to administrative officers ashore. The administration of economic warfare was centralized and an effort was made to apply administrative controls to contraband at

² See Mahan, *From Sail to Steam*, 271 (1907).

source—or before the contraband was shipped by sea. Under these circumstances, the “policy-voices” of naval officers were muted.

It had always been necessary for naval officers to have some understanding of economic warfare other than that immediately involved in their sea duties. This requirement exists today. All economic warfare tends to evolve towards defensive or offensive postures by adversaries requiring an interdiction of sea or air transport. The naval administrative (NAVAD) blockades of World Wars I and II were founded in part upon economic warfare postures of the contestants antedating military hostilities. While the diverse backgrounds of officers on blockade duty during the two great wars did not provide an officer corps well versed in general economic warfare techniques, the better the grasp by an officer of the administrative framework for economic warfare, the more efficiently he performed his duties. All economic warfare practices tend to interrelate—and effective or ineffective action in one zone of economic warfare is likely to be reflected in others.

Yet modern economic warfare, waged during insurgencies, counter-insurgencies and limited wars, is conducted without the major administrative structures which have been hastily assembled during the two great world conflicts and as hastily demolished at the end of them. Although the United States is prepared because of its extensive resources to wage economic warfare, it is deficient in economic warfare organization and theory. Our greatest neglect in this area has been our failure to recognize economic warfare as a coercive practice pattern deserving the attention of a permanent corps of professionals.

Absent such a corps of economic warfare professionals, the burden to grasp economic warfare theory and develop and use economic warfare techniques tends to rest heavily upon military officers—and particularly upon those in the naval service because of the intimate relation between naval power and the transport and use of material resources so ably spelled out by Mahan. In none of the other military services does the spectrum of decision making responsibility in economic warfare range from the situation in which tight central control leaves little discretion to the commander to the situation in which this commander is likely to find an economic warfare decision of the greatest national importance resting squarely upon his shoulders—nor in the other military services do these situations tend to shift with equal rapidity.

Furthermore, the tasks required of naval officers have become remarkably diverse in the nuclear age. In the time of Mahan, it was sufficient for a naval officer in a senior command position to be a good seaman and able fighter. Today he may have to serve as a diplomat or

political advisor or may perform sundry other tasks having political overtones required by the exigencies of a situation. He must understand the entire power structure in which he operates and cannot limit his study or inquiry simply to the details of naval administration and organization.

It is this new trend back to a form of decentralized decision making compatible with "organic" operational control, coupled with the increasingly diverse responsibilities which a naval officer is expected to discharge, which justifies an emphasis upon "legal strategy" in economic warfare at the comparatively low policy level here considered. In economic warfare which involves naval sea and air power only provisionally or peripherally, naval officers, although perhaps filling roles less conspicuous than those of civilian officials, may participate in economic warfare policy making as advisors even when not participating as commanders.

When one examines the minutiae of an economic warfare transaction—and a major effort to do this is made in this book—it is apparent that most of the critical decisions—those from which there is no turning back—are made at the level of application (or execution) of economic warfare policy. It is at this point that a naval officer is most likely to participate as an advisor or commander. As administrators, these officers also engage in administrative or "effective" lawmaking as they apply their orders to the facts.

The major responsibility of any military officer, including those in the Navy, is to understand and execute legal orders given them by their military or civilian commanders. A military officer has no license to formulate his own "law" or to engage in legal experiment. But in discharging his professional responsibilities, the officer becomes, consciously or not, both a contributor of new legal institutions and an assayer of existing legal institutions. As an "administrative lawmaker," a naval officer may contribute concretely to developing legal doctrines and techniques which take current facts and postulated future facts realistically into account. He may also induce authoritative decision makers to reject legal doctrine that has become irrelevant to contemporary fact. The process by which these developments occur is described in greater detail in Chapter I of this book. The process is as difficult to escape as it is to describe; although to suggest a naval officer may *make* new law, rather than simply administer laws passed or proclaimed by a constitutional body or civilian officer, appears superficially to invite unwarranted breaches of the mercurially sensitive lines defining civil-military relationships.

An understanding by naval officers of the distinctions between formal and effective lawmaking functions may sharpen their appre-

ciation of the importance of impingements of "law" upon economic warfare missions. Such an understanding may also dispel any false image these officers may entertain of "law" as an arbitrary or unreasonable restriction upon imaginative measures in economic warfare.

While a naval officer's participation in "legal strategy" in economic warfare usually occurs at the administrative or operational level as a commander or staff officer, he may participate in formulating economic warfare policy, including its legal elements, on a formal basis and at a high executive, legislative or judicial echelon. Rarely, he will serve as a member of a court or commission dealing with economic warfare policy. Perhaps he will be a delegate to an international convention dealing with legal issues in economic warfare from the perspective of the general community. Typically, however, his participation in economic warfare policy making on a formal level will be advisory only.

Thus, he may have special knowledge concerning some confrontation in which an application of economic warfare techniques is considered. His advice may then be sought at high executive levels. He may testify before a Congressional committee which seeks to define an economic warfare problem of naval interest and devise legislation to deal with it. He may offer testimony before courts. In one relatively recent case before the World Court, testimony by naval officers (none of them from the United States) had an important bearing upon the decision.³

In his participation in policy making at the various informal and formal policy levels mentioned, a naval officer deals with both national and international law. The major obstacle to his effective use of "legal strategy" is his tendency to regard national and international law simply as networks of rules to regulate conduct.

For this reason, Chapter I of this book offers a brief survey of the participants in economic warfare, their objectives and techniques and the conditions under which these techniques are employed. Chapter II then bears upon claims and counterclaims opposed in economic warfare and processes by which community decisions concerning these claims and counterclaims are formulated.

In Chapter II the confrontation between the United States and Cuba concerning elimination of the Cuban sugar quota in the United States closed market is used as a framework for discussion. Although conflict concerning a sugar quota seems at first glance to have little

³ The Corfu Channel Case, mentioned at page 371 *infra*. For a roster of the witnesses (British, French, Dutch, Swedish, Norwegian, Bulgarian and Yugoslav) and a summary of their testimony, see Alford, "Fact Finding by the World Court," 4 *Villanova Law Review*, 37, 69-74 (1958).

relevance to participation by a naval officer in economic warfare, it facilitates an examination of Communist economic warfare techniques with which naval officers are vitally concerned and an examination also of United States law bearing principally upon "defensive" economic warfare. The "sugar encounter" demonstrates how coercive economic techniques tend to escalate towards situations requiring naval action and displays the complexity of decision making in economic warfare waged by the United States.

There is no attempt in Part I or in the problems developed in Part II to do more than examine "legal strategy" in economic warfare from the decision-making perspective of a participating United States naval officer. Thus, the concentration is upon "claim processes": Who are the claimants and counterclaimants in economic coercion? What types of claims are asserted? In what conflict situations are they asserted? What strategies are emphasized? And what are the outcomes? Since *legal* strategy in economic warfare is emphasized, there is also concentration upon the processes of "decision" concerning these claims; but no effort is made to view the instrument of economic coercion in multiperspective as part of a world social and power process.

Policy statements by decision makers in the general community concerning economic warfare are quite sparse. It has been difficult in the past to generate issues in economic warfare which could be presented to an organ of the general community for decision. Moreover, the economic practices of the United States (coercive and persuasive) apparently thus far have been compatible with the demands of the general community; although this will not necessarily continue to be the case. If divergences occur, and as general community policy is gradually formulated in this area, analyses of economic warfare from a general community perspective, clarifications of general community policy and recommendations for alternative policies and procedures will become of increasing value. The groundwork in this book may facilitate a more ambitious analysis.

A multiperspective study, for example, will require the "economic instrument of coercion" to be located within the pattern of community coercive processes. The participants, their immediate and ultimate objectives, the conflict situations, the strategies of the participants and the effects of these strategies all should be accurately defined. The *claim* processes, as considered in this book, should then be examined, with emphasis, however, not simply upon the role in this process of a single type of executive officer, but upon the full spectrum of national claims and counterclaims and claims and counterclaims by participants other than states. The process of *decision*

likewise should be examined in detail from the perspective of the territorially organized communities and also from the perspectives of officials of international organizations and tribunals: their objectives; decisional situations; strategies; and the outcomes of their decisions being considered. An analysis in detail, such as this, might then permit a rational clarification of policy for the general community with alternative policies and procedures suggested in the light of current trends and conditions.

PART I

LAW, STRATEGY AND NAVAL OFFICERS

CHAPTER I

THE ANATOMY OF LEGAL STRATEGY IN ECONOMIC WARFARE

A. PARTICIPANTS, TECHNIQUES AND CONDITIONS OF ACTION IN ECONOMIC WARFARE

In the context of naval interest here emphasized, “economic warfare” describes an intense disturbance either of the flow of material resources among people or the use of these material resources by them. The disturbance is *coercively oriented* and *state* directed against an adversary to diminish its power.

Economic warfare is distinguished from “military warfare,” mentioned frequently in this book. Military warfare describes an intense disturbance of *human* resources, usually by death, injury or imprisonment. The two forms of warfare are not mutually exclusive. The preemption of human resources—such as forced labor—or the disorganization of labor may be described as “economic” warfare or “military” warfare in some contexts. Likewise, strategic bombing from aircraft or by ballistic missiles, intended to destroy both material and human resources, may be viewed as economic or military warfare depending upon the emphasis in context.

A *state* is a territorially organized and based community. Naval officers usually serve as state representatives. Economic warfare by international organizations tends to be planned and executed through state institutions.

“The flow of material resources” includes the discovery and circulation of these among the people of any communities involved in an economic warfare confrontation. “Circulation” includes the transport of resources. “Use” includes the processes by which values are produced from material resources. In most instances, these processes involve initial production of “wealth” from material resources, with wealth then being used to attain other values. The intense disturbances resulting from economic warfare thus usually are associated with “wealth” and the phrase “wealth flow and use” will be employed

in this book to refer to the processes—wealth and other—which are “disturbed” in “economic warfare.” However, the writer does not intend by using these terms to exclude from the ambit of “economic warfare” disturbances such as interferences with the transportation of weapons and military equipment, materials not usually viewed as “wealth” in a conventional sense.

Frequently wealth flow and use is disturbed in conflict dominated by persuasive elements. Conflict of this nature is not here considered. “Economic warfare” is used in this book to describe only those situations in which wealth disturbances are both *intense* and *coercively* oriented.

Naval officers are demonstrably adept in persuasive techniques. The naval service has long been familiar with “diplomacy of the quarter-deck.”¹ But naval officers are primarily specialists in violence. They are likely to participate significantly as commanders or advisors in economic warfare when wealth disturbances have a coercive edge. Persuasion has its place in economic warfare; but persuasion figures largely in the area of “legal strategy” incident to the execution of economic warfare policies.

“Economic warfare” includes *direction* against an *adversary*. The definition thus excludes inadvertent wealth disturbances. However, inadvertent collateral wealth disturbances often occur when wealth disturbances are directed; and the probable effects of these collateral disturbances should be considered when economic warfare is planned and executed.

Economic warfare has been described by other writers in various ways. All commentators upon the topic agree that economic warfare involves the manipulation of material resources to affect the power of an adversary:—The wealth of the adversary may be decreased. His use of wealth may be impeded. His wealth may be radically increased to induce confusion. The wealth position of the value manipulator or his ally may be enhanced.

But differences arise in the conflict situations and particular practices emphasized by these commentators. There are also variations in the clarity with which these commentators view economic warfare as “objective” or “goal” directed.

Some describe any coercive use of values by international organizations, states, corporations or natural persons as economic warfare if disturbances in the distribution of “wealth” and consequently of “power” are significant. Others emphasize the conflict situation. Traditionalists—those who view economic warfare as ending when

¹ See Paullin, *Diplomatic Negotiations of American Naval Officers, 1778–1883* (1912), *passim*.

military hostilities end—and also those writers who concentrate upon applications of physical violence—tend to regard economic warfare simply as confined to techniques supporting military operations against an enemy.²

Interest has been exhibited in recent years in coercive wealth practices intended to be used as substitutes for military violence.³ An expectation by these writers is expressed or implied, perhaps unjustifiably, that such uses of coercive wealth practices may avoid or minimize the hazards of general war stemming from localized armed conflict.

If one browses extensively in materials relevant to coercive wealth practices, any wealth practice having detrimental effect upon someone else can be found described by those sympathetic to the victim as “economic warfare,” while those sympathetic to the wealth manipulator, euphemistically, will describe the same practice as an “economic measure.”

Each of these commentators describes accurately certain segments of economic warfare. But none tend to deal with economic warfare, often because of the special context emphasized, in a broad policy perspective.

These differences in emphasis suggest a dual relation of economic warfare to other techniques designed to attain general state policy objectives. Economic warfare may be waged in a primary or in a secondary policy role.

If a strategist relies upon the projected effects of economic warfare to secure a desired response from his adversary, he conducts economic

² Medlicott, *The Economic Blockade* (Vol. I, 1952, Vol. II, 1959) is the most detailed and valuable study with this emphasis. Volume I contains a survey of prewar planning. The emphasis is upon British economic warfare operations but much American material is included. See also, Gordon and Dangerfield, *The Hidden Weapon, The Story of Economic Warfare* (1947); Basch, *The New Economic Warfare* (1941); Jack, *Studies in Economic Warfare* (1940); Siney, *The Allied Blockade of Germany, 1914–1916* (1957). Good short accounts may be found in McDougal and Feliciano, *Law and Minimum World Public Order*, 509–519 (1961) and Stone, *Legal Controls of International Conflict*, 457–544 (2d Ed., 1959).

³ See Welton, *The Third World War: Trade and Industry—The New Battleground* (1959); Wu, *Economic Warfare* (1952). Liska, *The New Statecraft* (1960) deals with economic pressure through foreign aid. Williams, *Economic Intelligence and Economic Warfare* (Vol. XV, Industrial College of the Armed Forces, 1952) emphasizes the importance of adequate intelligence in economic warfare. Useful fragmentary treatments are Haas and Whiting, *Dynamics of International Relations*, 233–242 (1956); Lincoln, *Economics of National Security*, 521–544 (2d Ed., 1954); McDougal and Feliciano, *Law and Minimum World Public Order*, 30–32 (1961); Strausz-Hupé & Possony, *International Relations*, 532–561 (1950).

warfare as a *primary policy device*. If a strategist relies instead upon the effects of other coercive or persuasive devices upon his adversary, waging economic warfare simply to support the device upon which he principally relies, he conducts economic warfare as a *secondary policy device*. Economic warfare thus functions in a secondary policy role when waged to diminish the resources of an enemy subjected to military violence as the principal sanction.

In the total policy spectrum of a state at any given time economic warfare may be waged both as a primary and as a secondary policy device. While the tendency is to employ economic warfare in a secondary policy role during military hostilities, even in this context examples of economic warfare employed in a primary policy role usually can be discovered.

In some situations, as in an environment characterized by intermittent resorts to military violence, it may be difficult to determine the precise policy role of economic warfare. The degree of reliance upon economic warfare shifts frequently depending upon the techniques a state prefers to attain its most important values. However, certain typical techniques have been associated with economic warfare in primary and secondary policy roles and identification of these may assist in determining the degree of policy primacy attributed by state policy makers to economic warfare in a particular context.

1. Common Economic Warfare Techniques

When waging economic warfare as a primary policy device, strategists tend to use competitive techniques developed in private commerce. Private commercial techniques are adopted and employed by state institutions. Alternatively, private commercial operations are diverted to state ends.

An adversary may be harassed by withdrawals of gold or other precious metals. These withdrawals are among the oldest economic warfare techniques. England, France and Holland withdrew gold from Spain in the 17th century by contraband trade with Spanish colonies. France hatched a plan in 1796 to coerce England by withdrawing guineas from circulation.

States have counterfeited currency of an adversary to reduce the purchasing power of valid issues. Louis Kossuth, exiled in England, had Hungarian florins printed by an English lithographer. Although not counterfeits of florins issued by the *de facto* Hungarian government, the Kossuth florins were intended to compete with this valid currency and reduce its purchasing power.⁴ The Soviet Union ob-

⁴ See *The Emperor of Austria v. Day and Kossuth*, 3 DeGex, F. & J., 217 (1861).

tained American plates used to print German occupation marks. After World War II, the Western occupation zones were flooded with excessive Soviet issues to obtain dollars from speculators, produce inflation and impede reconstruction.

Tariffs have been favored economic weapons. Used defensively, a tariff may be placed upon the goods of an adversary to force a higher price in the market of the strategist. A tariff may also be used offensively to destroy industries of an adversary. This was attempted by Louis XIV in his tariff war against Holland in 1667.

Barriers may be raised to imports or exports or to both. Austria dislocated the Serbian economy in 1905 by a boycott on Serbian pigs—a principal Serbian export. Embargoes frequently have been placed upon export of goods from the embargoing state. The United States, for example, imposed an embargo in 1807 upon American and foreign shipping from United States ports. This was designed to deny to France and England access to American resources in order to induce respect by both of United States claims to freedom in sea commerce.

Trade cartel manipulations have been favored devices for economic harassment.⁵ Nazi Germany used its control over Zeiss in Jena, which could influence by cartelization Bausch and Lomb in the United States, to induce Bausch and Lomb to reject British and French orders for military optical equipment prior to American participation in World War II.⁶ Research or production by an adversary may be blocked by cartel refusals to license patents or to disclose information necessary to use them.⁷ An adversary's industries may be injured by cartelized price cutting ("dumping"); by buying up critical materials ("preempting"); or by withholding critical intermediate products ("hoarding").

When economic warfare is waged as a *secondary policy device*, private competitive techniques, including cartel manipulations and similar methods, may remain important policy features. But when

⁵ Useful general references are Berge, *Cartels: Challenge to a Free World* (1944); Borkin and Welsh, *Germany's Master Plan: The Story of Industrial Offensive* (1943); Hexner, *International Cartels* (1946). For studies in special areas, see Hexner, *The International Steel Cartel* (1943); Marx, *International Shipping Cartels* (1953). Detailed materials concerning Nazi cartel operations will be found in *U.S. v. Krauch* (I. G. Farben Case), VII, VIII, *Trials of War Criminals* (1952); *U.S. v. Krupp*, IX *Trials of War Criminals* (1953); *U.S. v. Flick*, VI *Trials of War Criminals* (1952); *Nuremberg Military Tribunals*. See DuBois, *The Devil's Chemist* (1952); Reimann, *Patents for Hitler* (1942). Modern cartelization patterns and regulations are described in Edwards, *Cartelization in Western Europe* (1954) and Miller, *Competition Cartels and Their Regulation* (1962).

⁶ See Borkin and Welsh, *Germany's Master Plan*, 271–288 (1943).

⁷ See Reimann, *Patents for Hitler* (1942).

military force is the primary policy instrument, the most frequent circumstance in which economic warfare will be found in a secondary policy role, private commercial techniques are overshadowed by devices to destroy the enemy's supplies, storage facilities and production. These devices include, typically, air and sea bombardment of depots and shipping facilities, sabotage, and variations of blockade to interdict the water, land and air transportation of the adversary.

2. Protracted Harassment and Economic Sortie

Usually economic warfare is waged in the form of protracted harassment. The strategist gradually attrites the adversary's resources to attain his objective.

Economic warfare by protracted harassment is effective in a secondary policy role. Blockades, embargoes and boycotts, often associated with military hostilities, are typical harassing techniques.

Alternatively, and less frequently, economic warfare is conducted in the form of *economic sorties*. One of the best examples, seldom recognized by those unacquainted with economic warfare, was mounted by Spain against Napoleon in 1802. The Spanish objective was to force France to cede Louisiana to the United States. The objective was accomplished by Spanish withdrawal of the right of American citizens trading on the Mississippi to deposit goods at New Orleans pending ocean shipment, a right conferred by the Treaty of San Lorenzo (Pinckney Treaty) of 1795.

3. Economic Sortie and the Louisiana Purchase

In 1800, Napoleon, in the Treaty of San Ildefonso, required Spain to retrocede Louisiana to France. Napoleon planned to use Louisiana as a source of food and naval stores to support a French Caribbean coffee and sugar empire. The hub of this empire was to be Santo Domingo. France had acquired Santo Domingo in 1795. But by 1800, the island had fallen under the sway of Toussaint L'Ouverture. A necessary condition to execution of Napoleon's design was pacification of Santo Domingo by the French.

Because Santo Domingo had apparently slipped irretrievably from French control during negotiations for the Treaty of San Ildefonso, the Spanish did not suspect immediately the scope of Napoleon's Caribbean plan. His plan embraced construction of the empire from Spanish Caribbean colonies. These he would force Spain to disgorge at his convenience.

Although Spain had acquired Louisiana from France in 1762, her possession of the territory had never been secure. Louisiana was regarded by Spanish officials both as a wasting asset and as a probable

victim to American expansion. France, in Louisiana might block an American push into the Floridas or into the Southwest.

But when Napoleon committed twenty thousand men in an effort to overthrow L'Ouverture in 1801 and squandered thousands of reinforcements upon the expedition, the extent of his appetite for Spanish colonies became painfully clear. Santo Domingo would serve as the naval base and Louisiana the supply depot for a rapid extension of French Caribbean influence.

Relying upon the failure by Napoleon to secure recognition of the Prince of Parma as King of Tuscany, which he had agreed to do in return for the retrocession of Louisiana, Spain refused to surrender the territory. She prevailed in this bold position throughout 1802 principally because Napoleon's military expedition to take possession was frozen into its Dutch harbors in the severe fall and winter of that year.

The United States had expected to inherit New Orleans and its environs when the grip of Spain finally faltered. Accordingly, in the spring of 1802, negotiations commenced between Talleyrand and Livingston for purchase by the United States of the French territory recently acquired from Spain.

The Treaty of San Ildefonso, by which Spain retroceded Louisiana to France in 1800, remained secret until 1801. The terms of the treaty were then imperfectly revealed.

When Livingston commenced his negotiations with Talleyrand, he labored under the misapprehension that the Floridas, as well as Louisiana, had been ceded to France. His defective state of information, coupled with the evasiveness of Talleyrand and the indecisiveness of Napoleon, caused the negotiations to be protracted inconclusively through the summer of 1802.

Spain appreciated her inability to hold Louisiana if the force assembled by Napoleon was dispatched to take the territory. On the other hand, the difficulties of the French in Santo Domingo were becoming notorious. Yellow fever had weakened the French army, slain its commander, and threatened the expedition with destruction. The troops in Holland might be diverted to Santo Domingo. Although neither equipped for a Caribbean campaign nor immune to yellow fever, the efforts of these troops, coupled with those of the French "immunes" on the island, might overcome the disorganized and demoralized insurgents.

Spain was aware that Florida had been mentioned in the negotiations with Talleyrand. Napoleon, never the soul of honesty, might sell the Floridas and coerce Spain to transfer them. A major bastion to valued Cuba then would be lost.

The Spanish position was an unenviable one. Nevertheless, Spain

was favored by Napoleon's financial strictures and by his deepening despair over the Santo Domingan adventure.⁸ The Americans in Louisiana would prove uncongenial neighbors. But Spain might lose her Caribbean territories to Napoleon unless that conqueror's dream of empire, dependent upon his possession of Louisiana, finally could be dispelled.

In October 1802, under these circumstances, Morales, Spanish Intendant in New Orleans, withdrew the "right of deposit," announcing he did so upon his own initiative. He was instructed to say this in the secret Spanish order for the withdrawal.⁹

The right of deposit was critical to the United States to permit rapid development of its western lands. American traders on the Mississippi were inconvenienced and annoyed. Many believed Napoleon had ordered the withdrawal.

President Jefferson and the Congress responded with alacrity. The President appointed Monroe as Minister Extraordinary to act with Livingston. Congress appropriated funds for an intensification of negotiations and for part payment of the contemplated purchase price.

Dismayed by the fate of his Santo Domingan expedition, near bankruptcy, and faced with a war with England, Napoleon was now confronted with a threatened American seizure of New Orleans and a possible Anglo-American alliance. It was simple common sense to reap what advantage he could from the breached Treaty of San Ildefonso and sell the Louisiana Territory to the United States.

Avoiding constitutional obstacles to the acquisition of this unexpectedly large area, Jefferson advised his colleagues the less said about the legal points involved the better.¹⁰ The United States took possession of Louisiana after the French had held it for only twenty days.

In the atmosphere of rejoicing over the cession: France because she had the purchase price—which Napoleon imprudently lavished on landing craft to invade England; the United States because it controlled the Mississippi and had new lands for its citizens to exploit; the modest pleasure of Spain in eliminating the menace of

⁸ Napoleon, brooding in his place of honor at a small soiree in January 1803, burst out to the astonishment of the guests: "Dam'n sugar, dam'n coffee, dam'n colonies." Pratt, *A History of United States Foreign Policy*, 96 (1955).

⁹ Misled by a smokescreen of Spanish entreaties not to sell the territory, American historians wrote off the withdrawal as bungling by a colonial bureaucrat. Disclosure that withdrawal was pursuant to a Spanish order has not eliminated the confusion. Pratt, *op. cit.*, 92 (1955).

¹⁰ Latane, *A History of American Foreign Policy*, 110 (1934).

Napoleon to its Caribbean possessions was obscure. This is a tribute to the finesse of the Spanish action.

The seller was tactfully coerced—the buyer indelicately excited. Tension was attenuated because Morales' order was rescinded when the decisions to buy and sell were made.

The Spanish plan required manipulation of two legal features. First was construction of the Treaty of San Ildefonso (1800). Spain claimed Napoleon had breached the treaty. This gave Spain an argument for retaining Louisiana, set Napoleon “up for the kill,” and bought Spain time and space for maneuver. The right of deposit would be moot if New Orleans was ceded to the United States.

The plan was based upon a shrewd analysis of the pressures upon Napoleon, Jefferson and the United States Congress. The execution was effective because of careful timing of withdrawal of the right of deposit and its equally prompt restoration.

4. Principles of the Economic Sortie: Comparison With Elements of Military Strategy

As used by Spain against Napoleon, the economic sortie typically has been a form of economic warfare waged by weak against more powerful states. Seldom will these weaker states enjoy the resources required for economic warfare by protracted harassment; nor can they hazard the violent physical responses by their adversary which protracted harassment tends to induce.

In the economic sortie, economic coercion creates psychical disequilibrium in the power elite of the adversary. Sir B. H. Liddell Hart has described psychical disequilibrium as “the sense of being trapped.”¹¹

Strategy in military and economic warfare share this common purpose. The strategist seeks to dislocate the value processes upon which the power elite of the adversary relies. Thereby the psychical equilibrium of this elite is disturbed so that its alternatives for choice are narrowed to the area the strategist desires.

The Sense of “Entrapment”

A “sense of being trapped” springs from intuitive pessimism compounded by an induced belief that observed facts are unalterable. The condition typically is temporary; and this requires continuing action by the strategist to insure adherence by the target elite to the coerced decisions. Military and economic warfare strategists must play continually upon the twin keys of pessimism and observation.

The drive for personal security contributes to the conviction of a power elite, possessing maximum values within a group or the maxi-

¹¹ Liddell Hart, *Strategy*, 340 (1954).

imum opportunity to attain these values, that “security” lies in preserving the status quo. Intuitive pessimism stems from liaison of the postulate that change will probably be detrimental to the elite unless change factors are controlled with the observation that these factors tend to elude control.

In the economic sortie, the adversary power elite is confronted with sudden, radical and detrimental change. During this confrontation, the reaction of the adversary may be to accept the demands of the economic warfare strategist before the situation further deteriorates—the power elite assuming that if change is accepted a situation can be stabilized. This is the sense of resignation or entrapment in the power elite of the adversary which the strategist seeks. The desired process is retrogressive—a slow falling back by the adversary power elite to postures which it believes it can maintain.

Apart from this coincidence in objective of military and economic warfare strategies, there are other similarities as well as dissimilarities in principles. These should be understood to permit economic warfare, particularly the economic sortie, to be used with maximum effect by military officers in command or advisory positions.

Target Analysis: The Power Elite

The number, complexity and mobility of the power elite of the adversary are matters considered in military or economic warfare strategy. The less the power elite in number and complexity, and the less mobile its membership, the simpler becomes identification of key elite members and appraisal of their perceptivity and sensitivity. When the critical elite members are defined—those who have the power to make the decisions desired—effective and economical measures to disturb their psychical equilibria can be selected.

The present trend in governments of heavily populated states is towards complex power elites. Developments in the United States, the Soviet Union and Red China are examples, although China, historically, has exhibited complex governmental structures. This trend is accelerated by concomitant trends towards “neofeudalism” in world organization.¹²

Under these conditions it is difficult for either a military or economic warfare strategist to determine the points within the governmental structure of an adversary at which the desired decisions might be made. There have been few instances in modern times, for example, in which the power to make all critical decisions has been concentrated in a single person within the governmental structure of a major state. The administrative requirements of a major state

¹² See Fn. 19, *infra*, this Chapter.

weigh against such concentrations of power. Hitler and Napoleon perhaps come closest to exemplifying the hypothetical total concentration.

An adequate appraisal of Hitler's personal influence within his government was not made by Allied intelligence agencies before or during World War II. His degree of perceptivity of his environment and the psychical points at which he was particularly vulnerable to attack were not accurately ascertained.

The force of Hitler's personal leadership was demonstrated at intervals. His ability to retain his grip upon the German government after the attempted assassination in 1944 is a salient example. A great deal was learned about his personality and peculiar limitations when the war was over. But at no time during the war were the Allies able to disturb by military, psychological or economic means Hitler's psychical equilibrium in the manner that the equilibrium of the Fascist power elite was disturbed in Italy.

The defeat of Nazi Germany was accomplished by blindly groping forward to lay waste German military resources. This created a serious temporary European power vacuum. The power of the victors was substantially diminished.

An economic sortie directed to disturb the psychical equilibrium of Hitler would have been futile because Allied intelligence could not have supported it. To service effectively an economic sortie directed against the power elite within a complicated governmental framework, a more efficient intelligence system is required than any possessed by the combatants of World War II.

In the Age of Napoleon the difficulties in producing adequate intelligence were not equally great. The perceptivity, sensitivity and authority of Napoleon, the most analyzed man in history, were well known to his contemporaries. Many of these contemporaries at various times were both his allies and enemies.

After Napoleon's military reverse at Leipzig, which resulted in a loss of confidence in him by many of his officers and men, his enemies capitalized upon his quick perception of the morale of his troops and his unwillingness to fight with troops of low morale. Ignoring Napoleon's threat to their flanks, the Allies moved directly upon Paris. This was the major French supply base and the symbol of French unity and power. The loss of Paris was the crowning blow to the morale of the French army. Although he retained an army of substantial size, Napoleon abdicated when he concluded its morale could not be restored.

The economic sortie, as in the Louisiana Purchase, could be used effectively against Napoleon. The Spanish knew Napoleon, personally, could decide, once and for all, whether the Louisiana Territory

would be ceded to the United States or not. No Frenchman would quibble with him about it. The Spanish could also appraise the pressures to which Napoleon was subject and, based upon their past experience with him, how he was likely to respond to additional pressure placed upon him.

The less complicated the governmental structure of the adversary and the less complex its power elite, the less becomes the strategic intelligence burden in military and economic warfare. It is an anomaly that the economic sortie has been used most frequently by small states against great ones—when the intelligence burden is heavy—and less frequently by large states against small ones—when the intelligence burden is relatively light.

Assuming adequate intelligence relative to the identity, mobility, perceptivity and sensitivity of the target power elite, the techniques selected for dislocating the value processes of the adversary in military or economic warfare should be those conserving the resources of the strategist. This principle is described as “economy of force” in military operations. The principle is implicated equally in economic warfare.

Economy of force requires relationship of the means available to the end sought. At the outset the question is one of the intensity of value dislocation required.

Limitations Upon Impact of Economic Warfare

The intensity of impact of economic warfare upon a target will usually be much less than that developed by military methods. A few American writers, including those dealing with Communist economic warfare, appear to believe the potential effects of economic warfare and military warfare can be roughly equated.¹³

There is little in the history of economic warfare to justify this belief. In a culture conditioned to the use of wealth as a major basis for the exercise of power the tendency is to overestimate the potential of economic warfare.

The degree of psychical disequilibrium which a strategist must produce depends upon the resistance of the target elite. This resistance may be so intense that the degree of disequilibrium required may necessitate more coercion than can be developed in economic warfare.

Military power applied to an adversary may force major policy changes. Economic warfare alone seldom achieves this result. If an economic sortie cannot be combined with existing pressures upon an adversary, collateral pressures should be developed by supplementary economic, psychological or military methods.

¹³ E.g., Allen, *Soviet Economic Warfare* (1960), *passim*.

When complete psychical disequilibrium of an adversary is sought by a strategist, economic warfare often will be found to play a part in creating the disequilibrium. On the other hand, economic warfare usually will be only one of several policy devices involved.

When Lee was maneuvered out of his defenses at Petersburg in 1865 by Grant, he abandoned the line of the Weldon Railroad, which would have been the short route to a junction with the retreating Confederate Army of Johnston in North Carolina. Lee could look for no supplies over this rail line, Wilmington, North Carolina, having fallen to the Union forces. His supply shortage forced his withdrawal towards the Confederate supply center at Greensboro.

Hotly pursued by the Union Army, Lee lost Ewell's Corps, captured at Sayler's Creek. This cut heavily into his fighting strength. He then discovered Union elements entrenched across his line of withdrawal. His cavalry commander informed him that these elements could be driven off. But further difficulties complicated his operational planning.

The morale and physical condition of his remaining troops were poor. Many of his officers and men were willing to continue the fight. But many others had discarded their weapons and, while still with the Army, had abandoned their units.

Rations ordered to Lee at Amelia Court House had not arrived due to an administrative oversight. Rations on hand for the Army were low and forage for animals was exhausted. Neither could be replenished from the countryside.

The Confederate Army had hoarded its ammunition. Confederate ordnance officers reported approximately 75 rounds per man of small arms ammunition and 93 rounds per gun for artillery. This was sufficient for one major engagement. There were, however, no other ordnance supplies available to the Confederates in Virginia. The Union blockade combined with seizure of the copper mines in Tennessee had created a shortage of copper needed to manufacture percussion caps.¹⁴ Without percussion caps, most of the small arms then used by the Confederacy would not fire. At Appomattox, copper sufficient to manufacture percussion caps for a combat expenditure of two weeks was on hand in the Confederacy. This shadow overcast any further operational planning Lee might undertake.

Lee, at this time, was the single member of the Confederate power elite whose decision could irretrievably unlock the defenses of the

¹⁴ Brigadier General E. P. Alexander, a Confederate officer with much experience in ordnance supply, saw no answer to this "quandary." Alexander, *Military Memoirs of a Confederate*, 54 (1912).

South. If the Army of Northern Virginia surrendered, other Confederate armies in the field would fall like a stack of cards.

Possibly no single factor mentioned would have induced Lee to surrender at that particular time and place. But his perception of a combination of detrimental pressures, the combination being to a degree fortuitous, convinced him that surrender was the only rational alternative.

His logistical problems were an indirect outgrowth of economic warfare by the Union and the shortage of copper was a direct effect of the Federal naval blockade. However, it was obvious to Lee, and to most of his senior officers, that military blows would fall which he could not resist with the fragments of his army remaining. The surrender was produced primarily by military pressure. Economic warfare tended to affect principally its timing.

If multiple pressures cannot be developed against an adversary by the state of the economic warfare strategist, the simplest method for combining economic sorties with other coercive devices is to array a number of states in economic warfare. This might be done under the auspices of an international organization, such as the Organization of American States.

The exercise of military command under the aegis of an international organization may complicate decision making. The flexibility of military power may be limited in a fashion that compensation for the limitation may be required, such as an increase in military force applied or an extension of the area of hostilities to permit freedom of maneuver.

Economic warfare under the aegis of an international organization requires less coordination in decision making. The intensity of impact tends to be increased by multilateral economic action. The principle of economy of force thus tends to favor unilateral military action and multilateral economic action.

Sustentive Range and Ambit of Arrest

If economic action in the conflict situation is considered capable of creating the degree of psychical disequilibrium in the power elite of the adversary sought by the strategist, either alone or concomitantly with some other policy device or devices, then two additional problems bearing upon the principle of economy of force should be considered. The economic technique selected should have: (1) "sustentive range," and (2) an adequate "ambit of arrest."

"Sustentive range" means the degree to which the economic technique selected is amenable to supplementary action. Is it a technique which tends to preclude supplementary action? A power elite, forced to make a basic decision, must be locked upon its course. Psychical

disequilibrium is a temporary condition—and supplementary decisions will be required to execute any coerced policy.

Even though psychological disequilibrium of the desired degree has been created, there must be follow-up or supporting pressures as the effects of an economic sortie diminish. Deviations by subordinate officials of an adversary, for example, can alter a decision radically as it is executed. It may be necessary for the strategist to bring pressure upon these subordinates as well as upon the basic decision makers. Certain economic devices, such as manipulations of foreign aid, tend to lack sustenive range and, for this reason, violate the principle of economy of force.

“Ambit of arrest” refers to the likelihood of suppression by the strategist of the collateral effects of an economic weapon. Elements of “feedback” or “chain reaction” in economic warfare may attrite the resources of the state of the strategist or his allies. Can this feedback or chain reaction be controlled if the economic weapon under consideration is selected?

In the Nazi Regime, feedback from “defensive” economic warfare undertaken by Hitler against what he considered a private economic warfare program intended to undermine the financial structure of his government, resulted in a loss to the Nazi of foreign exchange and consolidation of the power of the SS within the Nazi hierarchy to the discomfiture of many Nazi officials. Liaison of this defensive economic warfare with persecution of German Jews provided an entering wedge for the SS.

As early as 1936, Hitler procured a law imposing mandatory punishment of death and confiscation of property upon a German who smuggled property abroad or left property abroad “for his own gain or for other low motives” so that damage was inflicted upon the German economy.¹⁵ Taking advantage of this problem of outflow of assets through emigration, SS officials inaugurated in 1938 an emigration program in which foreign assets of wealthy Jews in Germany were to be confiscated to subsidize the passage of poor Jewish emigrants. The program fell under the supervision of Reinhardt Heydrich in 1939.

Goering, and a few others high in the Nazi Party hierarchy, were alert to the economic problem the Heydrich program presented. Foreign exchange was being used up which Germany badly needed—with the difference between the amounts confiscated and the amounts paid for passage apparently lining the coffers of the SS.

Schacht, President of the Reichbank, proposed an alternative plan negotiated with England and the International Refugee Committee.

¹⁵ *U.S. v. Altstoetter, III Trials of War Criminals*, 182 (1951) *Nuremberg Military Tribunals*.

Schacht's Plan was to freeze the assets of the German Jewish Community and use these as security for a loan to obtain funds for passage. The loan was to be repayable in twenty or twenty-five years. The SS could not be permitted to do away with the security for the loan and the program would thus have to come under the supervision of Schacht in the Reichbank.

The Schacht Plan was rejected by Hitler, who failed to grasp the advantages to the SS and disadvantages to Nazi Germany as a whole stemming from Heydrich's management. Beyond the reach of the Reich Ministry of Justice, and thus enjoying practical immunity from civil or criminal action—amenable, in fact, only to the heavy-handed personal justice of Hitler, whose attention was distracted by military matters; senior officers of the SS ran the emigration program substantially as they saw fit. The program was extended to the conquered territories with commensurate financial returns to the SS.

As Hitler's policy shifted from emigration to his "Final Solution of the Jewish Problem," administration of the program by the SS, commencing in 1938 as an intended form of defensive economic warfare, burgeoned into a commercialized holocaust.¹⁶ Genocide now became one of the most profitable business ventures in history. Resources needed by Germany for the conduct of the war were expended foolishly and mercilessly in exterminating helpless people. Through ransom and other devices, the SS was increasingly enriched. By 1944, enjoying both economic power and the confidence of Hitler, the SS had become a state within a state. How this power could have been accommodated comfortably in the organization of a successful Nazi Germany is speculative. By any token, its power was a remarkable feedback from early Nazi experiments in economic warfare.

Economic warfare, like military warfare, to produce maximum psychical disequilibrium in the adversary, requires operations against points of minimum resistance. There are, however, differences in the range of selection of targets in economic and military warfare and also differences in time and disclosure factors when military and economic warfare techniques are employed.

Flexibility in Target Selection

In military warfare, the goal of psychical disequilibrium of the adversary is attained through the threat of destruction or actual destruction of human or material resources. Although the ultimate goal of economic warfare is identical, there is greater selectivity in intermediate policy objectives. For example, economic warfare may be directed against the legal institutions of an adversary. These

¹⁶ See Reitlinger, *The Final Solution*, 434, *et seq.* (1953).

would be an unremunerative target for military action. But disruption of the legal institutions of the adversary will tend to dislocate all value processes upon which the adversary relies.

An attack upon the legal institutions of an adversary often will require combination of psychological and economic measures. The legal system is weakened by propaganda reducing confidence in its administrators. The flow of wealth to the adversary is then decreased or increased radically to strain the weakened system. Psychological measures are unnecessary when the legal system is poorly developed or debilitated. A "wealth overload," such as that produced by premature industrialization of an underdeveloped nation, may place burdens upon its legal system which cannot be sustained.

A dramatic example of the potential political consequences of a "wealth overload" upon a primitive or debilitated legal system is dissolution of the Mongol Empire resulting in part from adoption of the "tax farm" as a revenue system. This policy was recommended to the Mongol Khans by Yelui-Ch'uts'ai, a North Chinese in the service of Jenghiz Khan.¹⁷

Probably Yelui did not foresee the developments following upon his recommendation. Millions of his fellow countrymen were threatened with extermination. As an alternative, Yelui recommended their preservation as a tax resource, a policy then not followed by the Mongols but subsequently adopted by them.

During an era in which the Mongol cavalry froze the whole of Europe in an ice of fear, the simple Yasak, or constitutional law, of the Mongols could not reconcile conflict among the hordes produced by competition for tax wealth. This struggle sapped the expansionist energy of the Mongols. Its divisive influence brought the Mongol Empire to an end.

Time-Space and Disclosure Factors in Economic Warfare

In addition to the range of selection of targets in economic warfare, which greatly exceeds that of military warfare, the direction and method of approach to the adversary also differ. This gives rise to different emphases upon the element of time in planning and executing economic warfare policy and upon the importance of disclosures of plans to an adversary. These differences may be introduced by describing a simple military operation.

On the second day of the Battle of the Wilderness, in 1864, the right flank of a division of General Sedgwick's Federal 6th Corps, covered in front by earthworks, was exposed by the unexpected with-

¹⁷ Curtin, *The Mongols*, 143-144 (1908); Howorth, *History of the Mongols* (1880) *passim*.

drawal of an adjacent unit. The exposed flank was discovered and reported to General Gordon, a Confederate brigade commander. General Gordon sought the permission of his corps commander, General Ewell, to attack this weak point with his brigade. However, Gordon's division commander, General Early, believed the Union 9th Corps was supporting the right of the 6th, and prevailed upon General Ewell to withhold permission.

After much time was lost, and darkness was approaching, General Ewell gave Gordon the requested permission at the insistence of General Lee, who had just arrived on that part of the field. The Union division on the flank was surprised and two of its brigades routed. But night fell before the Confederate attack could be fully developed. The assault lost momentum and the Union generals obtained sufficient respite to reinforce the position of the 6th Corps.

The Union weakness was temporary; and the Union generals had the resources to remedy it. Had speed been developed in planning and launching the Confederate attack, time would have worked against the Union Army. The shift of men and materials (mass) to the point of weakness by the Union generals was permitted by the delay of the Confederates and the cover of darkness.

The military maneuver (using the term as embracing both planning and execution) has as its major feature the movement of men and material in space to concentrate or mass power at critical points—those at which decisions can be obtained. The space and mass problems in military and economic warfare are much the same.

Gordon's problem was to limit the space for maneuver by the Union force while developing additional space for his own maneuver. Upon disclosure of Gordon's intention—which occurred when the strength of his attack was demonstrated—the Union force extended its space for maneuver by utilizing its ability to reinforce the point of attack. The space in the area of confrontation was *constant*. Gordon's space for maneuver was decreased as the Union space for maneuver increased. Space is determined by the ability to utilize mass.

The analogy is substantially complete in economic warfare. A victim of economic attack can look to its actual or potential allies for assistance just as the Union generals could call up reinforcements to help the 6th Corps. The more help the target of economic attack receives, the less the maneuver space of the attacker.

Two differences are in time and disclosure factors. These factors also differ when economic warfare is used as a primary policy device and when it is used as a secondary policy device. A third difference lies in the emphasis upon institutional changes in economic warfare which are minimal in military warfare.

In the military maneuver, the *time elapsing* while a plan is formulated and its execution begins increases or decreases the chance that the adversary will discover prematurely by inadvertence of the planners or by espionage the nature, time and point of attack. If the nature, time and point of attack are not *disclosed* until the attack is executed, the psychical disequilibrium of the adversary will be intensified.

As the level upon which strategy is formulated becomes higher, the emphasis upon concealing the *nature* and *point* of a proposed attack and the ability to conceal these elements progressively decreases. Emphasis upon concealing the *time* of the attack correspondingly increases. In a future possible war between the United States and the Soviet Union or Communist China, no appreciable uncertainty exists concerning the nature and probable points of attack by any contestant. The elements which will be held most secret are the times for attack when these are determined and the resources which would be committed.

When economic warfare is used as a *secondary* policy device, the requirements of the primary policy device will control. In this secondary role, economic warfare often will be waged to support military action. When strategy at a high level is supported, the method and direction of economic warfare will be limited only by the requirement that the time and resources for attack be concealed from the adversary. If military strategies at lower levels are supported, it may be necessary to conceal the nature and point of the military attack as well.

In either instance, the time elapsing between the time strategic planning commences and the time the plan is executed will condition the method and direction of economic warfare. Neither the direction nor method of economic warfare, considering the time of exposure of the military plan to potential disclosures, should compromise elements concealed to enhance probable success of the military action. Economic warfare in this situation is used to attrite the defense or blunt the attack of an adversary. Reliance is placed upon military action to produce psychical disequilibrium of the adversary power elite.

When economic warfare is employed as a *primary* policy device, the element of delayed disclosure to produce surprise, so critical in military operations, is not equally significant. When a strategist relies upon economic warfare as a primary policy device, psychical disequilibrium of the adversary is produced by realization of an anticipated detriment. It is not the shock of the unexpected, as in military operations, producing disequilibrium by disorientation and distraction, but rapid progress of the expected which enhances intuitive

pessimism of the adversary power elite. There may or may not be danger in disclosure of the economic warfare plan. The premium upon time in planning economic warfare as a primary policy device thus often will be much less than in planning military strategy.

Premature disclosure would have spoiled the effect of the Spanish withdrawal of the right of deposit at New Orleans. Napoleon's pessimism concerning his Caribbean venture was stimulated largely by his military difficulties in Santo Domingo. The Spanish recognized this ill fortune and took advantage of it. Premature disclosure of the Spanish plan would have crystallized a counterpolicy for Napoleon—not induced his sale of Louisiana by compounding his pessimism. Napoleon was highly perceptive and could be counted upon by Spain to take changes in his environment rapidly into account.

But the perceptivity of the adversary power elite in the conflict situation may be such that disclosure or "leaks" of a plan may be necessary to create a psychological milieu in which an economic sortie will have maximum effect. Time may be required to insure perception by the target—or to bring home to the target the nature of the attack proposed.

A delay of this sort usually cannot be tolerated in military operations. In the Mau Mau War in Kenya, for example, military action was against small and mobile groups. In few of these was a power elite clearly defined and the perception of the leaders who could make decisions for the Kikuyu was so limited that they could not readily grasp the extent of the power arrayed against them. There could be no delay, however, for indoctrination. Militant tribal elements were hunted down and exterminated. The survivors were placed in compounds for a deliberate effort to reeducate them.

In economic warfare, especially when waged by economic sortie, when the adversary power elite proves unperceptive the strategist must disclose his plan or elements of it so the target power elite can observe and appreciate its vulnerability. This would never be done in military operations other than as a feint or distraction. But the disequilibrium creating processes in military and economic warfare differ. The former disorients by surprise and shock; the latter by the shock of an anticipated detriment suddenly experienced.

Problem of Institutional Change in Economic Warfare

The rapid institutional changes often required in economic warfare, contrasted with the relative stability of institutions in military warfare, a third difference heretofore mentioned, place a premium upon the capacities of contestants in an economic warfare situation to alter administrative routines, legal procedures and doctrines, and

sometimes basic political tenets. In military operations, units may be reorganized, reequipped or retrained, but the basic patterns for these changes and the basic patterns for employment of the units change quite gradually. Military laws, standing operating procedures and administrative routines, are virtually static. The higher the level of military management, the more static these elements tend to be in order to avoid the disturbance at lower command levels which shifts in basic guidelines tend to produce.

Major variables in military operations tend to be in physical conditions, such as weather, terrain; range and flexibility of weapons; number, health and experience of personnel. The smaller the unit for which action is planned, the greater the likelihood that unorthodox strategies and tactics will surprise the adversary by confronting him with unexpected situations.

But the larger the force directed, and the more complicated and destructive the weapons with which the force is armed, the greater the need for simple and fixed routines for its employment. With the large force, as has been pointed out previously in this discussion, the emphasis is greater upon the time element than upon unorthodox technique or even upon secrecy concerning the method and point of attack. In any large force, we must deal at the level of execution of policy with small units, and it is here that the premium is upon unorthodox and unexpected action in conflict.

To this extent there is a resemblance in degree to the institutional change required in economic warfare. The difference is that in economic warfare this institutional change is of value at high policy levels; although at these levels, institutions, and in particular legal institutions, tend to resist change. The more basic or fundamental a legal or political doctrine is found to be, the more difficult and time consuming the processes of changing it.

The difficulty and tendency towards delay in change does not arise from failures of communication in explaining change to the political mass of the state of the economic warfare strategist. In primitive legal systems, change has been explained successfully through the appealing mysticism of revelation. Mature legal systems have sophisticated and effective mechanisms for change, such as the dialectical materialism of the Marxists or the doctrine of judicial supremacy, perhaps a less flexible device, developed by judicial decisions in the United States. These change devices are important safety elements in complicated societies.

The resistance to changes in basic laws or political doctrines stems from the power elite of the community. This elite cannot predict with certainty the effect change will have upon the law and nonlaw conduct patterns of the political mass. Experiments with "positive" law,

doctrines and operating institutions specialized to immediate although often temporary reductions in the intensity of conflict, are conducted constantly without excessive community disturbance. Experiments with fundamental law and political doctrine, policy statements of guidelines or basic value preferences of a community, are hazardous and unpredictable and for these reasons are undertaken infrequently.

Power elites in monolithic societies, such as the Soviet Union, have demonstrated their ability to change positive law rapidly to support foreign policies in economic or other areas. Difficulty has been encountered with basic law and political theory.

Stalin's "Dual Market" concept, for example, the lodestone of Soviet economic warfare, was a sharp break from conventional Marxist-Leninist economic theory. Never completely accepted by the Soviet Communist Party during Stalin's lifetime, the concept was quickly repudiated after his death.

The resistance to change or "legal inertia" encountered in attempted manipulations of legal and political institutions affects economic warfare principally in the planning stage because planning tends to be done in coercion of this nature principally upon a high policy level. The speed with which plans can be developed is inhibited and premature disclosures of plans are sometimes forced. As previously indicated, in some forms of economic warfare and in certain policy contexts, these delays and disclosures may be advantageous. When economic warfare is used as a primary policy device, disclosures may be desirable to insure perceptivity in the adversary power elite. In economic warfare by protracted harassment, time typically is of little significance in either planning or execution.

But when economic warfare is waged by economic sortie, time and secrecy may be critical. Delays and disclosures stemming from legal inertia in planning may be compensated by speed and flexibility in using positive law and administrative routines as the economic sortie is executed. Planning at this policy level also is required. But pressures at the operational level exclude the full impact of formal legal inhibitions and place a premium upon invention and initiative.

At this operational level in economic warfare, usually requiring rapid planning under pressure, naval and other military officers are likely to play an important part. The major problem of these officers at this policy level, apart from the difficulty in finding and correlating facts, will probably be a problem in "legal strategy." How do legal institutions bear upon policies under consideration and how can these institutions be used effectively in executing a policy which is selected? It is in the context of "legal strategy," also, that the ad-

vantages of the "economic sortie" become apparent when compared with economic warfare by protracted harassment.

5. Policy Advantages of Economic Sortie Techniques in Economic Warfare

The context in which economic warfare is waged is in constant change. Unless the fact and nature of context changes are appreciated by all policy makers at all levels of decision in economic warfare, blind adherence to accustomed techniques, such as embargoes and boycotts, may damage the state waging economic warfare and non-participants in the conflict as well. This diffusion of damage, among other consequences, may give rise to authoritative characterizations by institutions of the general community that the damaging economic action is impermissible. Various detriments to the state waging economic warfare may stem from these characterizations.

Economic Sortie as a Primary Policy Device

In a wealth environment in which the resources of all competitors are sharply limited, as in private commerce or as in the international arena of economic conflict in the 18th and 19th centuries, private commercial techniques could be used effectively by a state to stifle competition and support monopolies in values. This wealth environment was rapidly changing in the late 19th and early 20th centuries.

A strategist contemplating economic warfare today discovers his adversary is no longer economically isolated as he might have found the adversary "naturally" isolated in the 19th century. In part, this is due to technological developments, including for future consideration developments in nuclear power. The more important reason for the disappearance of economic isolation, however, is the trend towards politicization of wealth distribution processes among states. The element of "economy" or "wealth conservation" in converting the resources of states into wealth is subordinated to estimates of the political advantage to be derived.

Red China, for example, procures sugar from Cuba for political reasons rather than from more accessible and less costly sources. Payments for the sugar are in goods or raw materials manufactured or produced without regard to a profit motive. The massive aid programs of Western and Sino-Soviet states seem now permanent features in the structure of external relations of the states concerned.

The politicization of wealth distribution processes is due in part to reactions by affected states to economic warfare by protracted harassment in the past. The more protracted and intense harassment becomes, the more rapid becomes generation of defensive energy. In part, the politicization of wealth distribution processes also described

the preference of currently powerful states for economic warfare by protracted harassment.

These influences of the past and trends of the present have produced three conditions complicating the waging of economic warfare in any form which a strategist might select. (1) A neofeudal psychology attenuates the impact of economic action. (2) Predispositions by policy makers concerning economic warfare make joint economic action difficult to organize and, as previously indicated, joint economic action tends to be the most effective. (3) A maze of legal doctrines and administrative regulations make rapid economic action difficult to execute.

Neofeudalism: Economic Reinforcement

Economic and political ties are becoming tightly drawn among states: expectations of aid by states lacking or poor in resources, whether or not formalized in agreements, are becoming both stereotyped and realized in fact. An emerging neofeudal psychology in both the Western and Sino-Soviet spheres of influence is replacing colonial ties.¹⁸ For example, wheat, steel, aluminum, and the mental and physical resources involved in producing these things, are increasingly symbolized as "Free World Assets," *vis-à-vis* those of the Soviet or Sino-Soviet Blocs.

During the Suez Crisis of 1956, a Soviet trading corporation breached its contract for sale of crude oil to Israel. Thirty years before, nondelivery of the promised oil would have been a major impediment to execution of the war plans of a state dependent upon foreign sources for fuel. The Soviet oil embargo proved a temporary annoyance in 1956. The necessary oil was obtained by Israel from her Western allies.

In its economic war with Cuba, the United States can aggrandize the internal problems of the Castro regime by an embargo and boycott. But Castro can look to Sino-Soviet states for aid. This has included not only military supplies but sufficient food to maintain the Cuban people at a subsistence level.

¹⁸ The enduring element of European medieval feudalism has been the psychology of *status* infused into the English Common and European Civil Law. The essence of neofeudalism is the expectation, now generally shared, that certain communities are entitled to economic assistance because of *state status*. The concept of reciprocal responsibility by a state so aided to support, politically or otherwise, the state or international organization furnishing economic assistance has not crystallized. Competition in foreign aid, a mild form of economic warfare by protracted harassment, reduces the prospect that this obligation of reciprocal support is likely to develop by encouraging the recipient of aid to take advantage of its bargaining position.

It is no answer to the dilemma of the economic warfare strategist to suggest waging economic warfare against those states with no political friends. Not only are true political pariahs rare but those that can be found are unlikely to pose a threat justifying retaliation by economic measures.

Alternatively, a strategist may seek assistance from other states to prevent escape by the adversary or may act with such speed that escape is impossible. But past economic warfare by protracted harassment has created an environment in which joint economic action is difficult to organize and economic action in any form is difficult to execute speedily.

Difficulty in Mobilizing Joint Action

It has been pointed out in this Chapter that the most effective economic warfare is that waged jointly by two or more states. The best chance to obtain this cooperation is under the aegis of an existing international organization.

Article 41 of the United Nations Charter provides in part for an application by members of measures including “* * * complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication * * *” when called upon to apply these measures by the Security Council. However, political divisions within the United Nations, complicated by a rapid increase in membership, make effective cooperation in economic warfare within the framework of the Organization unlikely. This suggests that joint economic warfare can be organized most frequently within the framework of an existing regional organization. But action within these organizations as well as action under special agreements formulated for the purpose also suffer impediments.

Economic warfare by Western states and those of Sino-Soviet orientation is complicated by the predisposition of allies or rivals to seek advantages as third parties in an economic conflict situation. In the Western bloc the predisposition is to reap commercial advantage for private profit from the conflict. British and Canadian transactions with Cuba, offsetting to a degree the impact of the United States embargo, are examples.

The Sino-Soviet split has resulted in similar conflict within the Communist world, although political and not economic profit motives are dominant. Red Chinese aid to Albania, offsetting Soviet economic action against that country and weakening action against Albania by European Soviet satellites, and Chinese interference with Soviet aid to North Viet Nam illustrate the joint economic warfare problem of the Communists.

Apart from these obstacles to organizing joint action in economic warfare, policy makers are predisposed to resist participation in economic warfare by protracted harassment.

There is a widely shared belief that economic warfare alone seldom can force a decision by an adversary. It is assumed that supporting techniques must be employed, sometimes involving a greater degree of physical violence than the situation is deemed to justify. While the actual effects which economic warfare can be expected to achieve depend upon the degree of psychical disequilibrium required in the power elite of the adversary, the negligible results characteristic of economic warfare by protracted harassment lend some support to the assumption that economic warfare alone can achieve no important effects.

These policy makers also fear "feedback" injury in economic warfare. A characteristic of economic warfare by protracted harassment is the additional protraction and wide diffusion of its effects. The danger of stimulating panic is particularly acute.

France, for example, withdrew short term credits to German and Austrian banks to undermine the Austro-German Customs Union of 1931. These withdrawals contributed to the failure of a major Austrian bank. Seeking to forestall this French effort, England made an emergency loan to Austria. Retaliating, France withdrew gold from the Bank of England; whereupon England abandoned the gold standard to weaken the gold position of France. Disturbances produced by these actions reinforced the impact of initial failure of the Austrian bank and caused numerous German bank failures. The latter were felt globally.

Awareness of propaganda losses often incident to economic warfare contributes to the unwillingness of state officials to participate in joint economic action. The potential propaganda losses are balanced against potential gains to be achieved.

The propaganda loss is based in part upon a general readiness by people everywhere to identify economic warfare with the planning of aggressive war charged against defeated political and military leaders of the Axis powers after World War II. This symboliĉ "guilt by association" has proven useful, especially to Communist propagandists. But more significant is the hypersensitivity of officials of new or underdeveloped countries to economic pressures—including those of an innocent and entirely innocuous nature.

To relieve a famine in India, for example, the United States Congress directed the Administrator for Economic Cooperation to provide emergency food relief on credit.¹⁹ Unfortunately, the Administrator was instructed to seek concessions.

¹⁹ India Emergency Food Aid Act, 65 Stat. 69 (1951).

These concessions were not a condition to the credit or stated explicitly in the statute. However, one major concession to be sought was removal of the Indian embargo on monazite sands, a thorium source. Another was increased sales of hemp to the United States.

Propaganda hostile to the United States could be based upon the innocent coupling of relief with proposed agreements to buttress the military strength of the United States. The Communists were alert to their advantage. The Indian embargo and trade policies remained unchanged; and the United States lost much of the goodwill in India which its relief efforts might otherwise have engendered.

The difficulty in obtaining cooperative state effort in economic warfare might be compensated to an extent by speed, accurate direction, and force in economic action. But fused with the hostile psychological environment in which economic warfare is waged, is a legal environment limiting the flexibility and speed possible in formulating and executing economic warfare plans.

As pointed out previously in this Chapter, and reiterated here for emphasis, institutional changes tend to be required in economic warfare. These include changes in legal institutions. More changes tend to be required when economic warfare is planned than when economic warfare is executed; and institutional changes in economic warfare are more extensive than those required in military warfare.

"Legal institution" refers to a *type* of decisional process within a community. The description is based upon the presence of the element of "formal authority" within a community which has attained a level of complexity and achieved a degree of cohesion permitting *formal* location of a decision-making function within its power structure. A community might, for example, have ethical decisional processes, or ethical institutions, without the element of "formalization of power" associated with legal institutions.

A group of power holders within the community make effective decisions which are translated into action at a formal policy level through legal institutions. This group has been described, in discussing economic warfare intelligence problems hitherto in this Chapter, as a "power elite."

The reader should not understand "power elite" as synonymous in most instances with a narrow clique which closely holds the power possessed by a community. In the state-community, the power elite typically is quite complex. Furthermore, the power elite is relative to the decisions required in a specified confrontation: who makes the effective decisions?

The reader should also consider that all power elites, viewed through time and not in relation to a static set of events, are mobile in membership. Human mortality, in addition to other mobility

factors, produces a "biological" revolution in any power elite approximately each quarter century.

A power elite uses the legal institutions of its community to approximate a dynamic value equilibrium within the community membership. The group attained cohesion in the search for common values. Unless the members have access to the values the group was organized to seek, cohesion will be weakened or lost. Cohesion increases or diminishes with the efficiency with which a value equilibrium can be approximated. The larger the group, the greater the difficulty in performing this function.

Expressing the same idea in different terms, the power elite intervenes in subgroup conflict to regulate the tempo with which values shift within the community. The intervening policy makers consistently fail to keep abreast of the conflict events: a problem described as "culture lag." The dynamic value equilibrium *can* only be approximated. As Dean Pound once wrote, all thinking about law " * * * has struggled to reconcile the conflicting demands of the need of stability and of the need of change. * * * " ²⁰

National Legal Context

Viewing economic warfare from the perspective of the power elite of the state of the economic warfare strategist, the dynamic value equilibrium of the state is threatened or disturbed by economic warfare in two ways. There may be economic attacks by other states. Also feedbacks from offensive economic warfare policies may create disturbances.

The economic warfare strategist thus is likely to find his economic warfare planning embarrassed by his own national legal doctrine: or the past expressions of policy by the power elite of his state community, recorded or recalled, developed in past defenses to economic attack or in past efforts to offset feedbacks from offensive economic action. The economic warfare strategist tends to become entangled during *offensive* planning in patterns set by past *defensive* thinking.

The national legal doctrine of interest to an economic warfare strategist in the United States usually will be found expressed in Federal statutes and administrative regulations. The impact of state policy within the United States upon economic warfare planning has grown progressively less; and recent decisions by the United States Supreme Court suggest negligible influence of state policy in future economic warfare planning.²¹

²⁰ Pound, *Interpretations of Legal History*, 1 (1923).

²¹ Landmark cases limiting potential state influence in economic warfare planning and execution are *Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

These national policy statements must not be viewed by the economic warfare strategist simply as an immutable and static doctrinal pattern through which a line of effective economic action is to be threaded. Decision makers do observe past policy statements (legal and otherwise) in dealing with current conflict. The statement may be influential in determining the end or goal sought. It is even more likely that the statement will be influential in the methods chosen to attain the end.

Nevertheless, the problem of the economic warfare strategist is not simply one of avoiding "legal obstacles," either by fast legal footwork or by skill in obtaining changes in legal institutions, but to *use* effectively existing or changed legal institutions to attain his economic warfare ends. The *use* of the institution is the major element of legal strategy in economic warfare. The use of legal institutions imposes two major requirements upon the economic warfare strategist.

He must grasp the idea, first, that to obtain institutional changes required in economic warfare he must identify and interrelate both the variables in the confrontation requiring planning and the variables supporting the legal institution which he seeks to change. The problem is illustrated in detail in Chapter II, dealing with United States defensive economic warfare against Castro Cuba.

The strategist must appreciate, for example, the need for locating and identifying the policy makers in the confrontation; the ends or values which these policy makers seek; how the institutions the policy makers are likely to employ will affect persons whose responses in the confrontation are significant; and the probable nature of the responses of these affected persons.

Once the relevant variables are firmly within his grasp, the strategist must then, as a second head of his problem, and the direct road to solution of it, realize that although he may plan economic coercion, his success in the legal strategy of coercive economic action will turn upon his powers of persuasion. How a power elite will respond in a confrontation may be predicted in part from legal doctrine apparently relevant to the facts.

But the double pinions upon which the persuasive mechanism is based are adequate appraisals of (1) the understanding of the elite concerning the meaning of "law" and (2) the understanding of the elite concerning the meaning of "lawmaking." Who is thought to be authorized in the relevant legal order to make legal policy? What is the appropriate time for making or remaking a legal policy? How should the legal policy be made or remade when the appropriate time arrives? The postulates of the power elite concerning these issues must be understood if it is to be persuaded to modify or permit the modification of legal institutions.

The postulates of power elites concerning these issues and the problems of persuasion consequently created for the economic warfare strategist are discussed in greater detail subsequently. For present purposes, the reader should observe that practically all of the existing national legal doctrine relevant to economic warfare has been keyed to economic warfare by protracted harassment. This applies both to fundamental doctrinal statements and to statements concerned principally with operational method.

When the economic warfare strategist favors the economic sortie, he presents fact situations to which past expressions of legal policy are inapposite. Adoption of the sortie technique is not a panacea which will eliminate the economic warfare strategist's national legal difficulties. But the technique will tend to free the strategist from the embarrassment of predispositions of his national power elite based upon existing legal doctrine.

This is not to suggest that one is free to do things not specifically prohibited by legal doctrine. However, the sortie technique does permit the strategist to deal directly with postulates of the power elite concerning law and lawmaking and to present or consider for decision with greater ease the variables in the confrontation. The likelihood of a rapid and adequate decision consequently is enhanced.

Legal problems produced by the national law of the economic warfare strategist are not, of course, the only legal problems encountered. The emphasis in this book is upon the *international* legal problems in economic warfare.

International Legal Context

However, in the perspective of "legal strategy" in the world community, the economic sortie as a primary policy device also is believed to have advantages in speed and direction, and consequently potential effectiveness, outweighing advantages likely to be achieved through protracted harassment. These advantages in speed and direction arise, nevertheless, for a different reason than in the national law context of the economic warfare strategist.

In the processes of authoritative decision through which the public order of the world community seeks to establish a dynamic value equilibrium, the modest goals having current general consensus are preserving *minimum* order and obtaining *minimum* destruction of values. Goals more conducive to stability than these seem presently beyond the capabilities of the rudimentary legal and political institutions of the world community.

International administrative institutions, such as the World Bank and Monetary Fund, have been created as "neutral" authorities to interrupt certain kinds of coercive economic exchanges in their incep-

tion. This is because the protracted and diffused tensions generated by economic harassment have not been dissipated readily by negotiation or arbitration. Disputes involving economic warfare have been aired before organs of the United Nations or before regional agencies, such as the Organization of American States, and opinions have been expressed even when decisions have not been rendered.

Resort to these international institutions probably will increase, especially among states which, since World War II, have renounced the use of certain kinds of coercive wealth practices in the charters of international organizations or in bilateral or multilateral trade or security treaties. New or underdeveloped nations, often targets of economic attack, are becoming both influential and vocal in international affairs and may be expected to invoke the procedures of international organizations as a defense.

Authoritative doctrinal statements concerning economic warfare as an outcome of the decisional processes thus briefly described are not numerous. It is evident, on the other hand, that international legal activity in this area is increasing.

The major advantage of the economic sortie in this context is not, as in the context of national law, the presentation of facts to which existing legal doctrine is inapposite, but the reduction of invocations of world community authority. With less diffusion of injury in the economic sortie, there is less chance for a complaint.

Interventions by the world community will usually occur *after* execution of the economic warfare policy has commenced. The important bearing of national law, by contrast, tends to be upon the *planning* stage of economic warfare.

The potential impact of international legal institutions upon the execution of economic warfare policies must be taken into consideration in economic warfare planning also. But if an intervention by the world community occurs during execution of the policy, a point clearly of "no return" for the policy maker, various "feedbacks" of an economic or political nature can be anticipated in the state which has taken the economic action.

In addition to reducing world community interventions by reducing the incentive of complainants to invoke world community legal procedures, the economic sortie may cushion the impact of any interventions which do occur. The policy may be executed before the intervention takes place. The sortie will then have to be supported by further action (assuming the technique has sustenive range): and the intervention may occur to attenuate the supporting action. However, the strategist is forewarned and can modify his successive policy to accommodate the legal events or, as suggested in the discussion

of national legal problems, can seek the legal institutional changes necessary to effectuate his policy.

*Summary of Advantages of Economic Sortie
as Primary Policy Device*

Only the most sanguine student of economic warfare would conclude that preferences for economic sorties will be likely to alter to any discernible degree the hostile psychological environment in which economic warfare is waged. Joint state action will be as difficult to mobilize for economic sorties as for protracted harassment.

In addition, until economic warfare as a primary policy instrument receives the detailed and consistent professional attention devoted to military strategy and tactics, the virtues of economic sorties may not be recognized by the policy makers of economically powerful states of the Free World. These policy makers are predisposed by their domestic commercial environment to techniques of protracted harassment.

However, the economic sortie does permit, largely through the flexibility of strategy in the legal sphere, the development of speed and direction, compensating for the lack of joint action in part, and precluding economic reinforcement of the target of attack. The effect of offensive economic action is thus enhanced.

Time is not invariably critical in economic warfare. Indeed, an economic warfare strategist, to insure that his policy has the desired effect, may have to delay execution of his economic warfare plan to bring home to the unperceptive power elite of an adversary the nature of the economic coercion contemplated.

But a power elite so unperceptive is unlikely to pose a serious threat to the state of the economic warfare strategist; and a state, such as the United States, committed to maintaining Free World values, will engage in economic warfare only when these values are jeopardized. A realistic economic warfare target for the United States will be the perceptive power elite of a dangerous adversary. It is against such an elite that speed and direction in economic warfare are important. These can be maximized in the economic sortie.

In rare cases in which multistate economic warfare as a primary policy device can be organized, the advantages of speed and direction in the economic sortie are not as significant as when the state of the economic warfare strategist acts unilaterally. Nevertheless the force and effect of multistate economic warfare will be enhanced when the economic sortie is the preferred form of economic action.

Are the advantages of economic warfare by economic sortie equally pronounced when economic warfare is waged to support applications of military force? When economic warfare is used in this secondary

policy role the nature of the military operations will determine the form of economic warfare employed.

Economic Sortie as a Secondary Policy Device

Postulated future military operations range from a global cataclysm with ultradecisive weapons to limited unconventional military efforts of a guerrilla type. General conflicts of the World War I or II type are possibilities; and limited conflicts between major powers or powers of the second or third category may involve the strategies, tactics and weapons familiar in the Korean War. Military activity may be concentrated upon land or sea, or in air or space—and probably will occur in all of these media.

With this great variation possible in the nature and form of future military conflict, and military institutions and needs determining the form and direction of economic warfare as a secondary policy device, discussions of economic warfare in future military contexts are necessarily speculative.

If weapons of the types familiar in World Wars I and II dominate the battlefields and seas in World War III, military strategies and tactics are likely to be similar, and the supporting economic warfare probably will be the traditional protracted harassment interspersed with economic sorties. It is probable, on the other hand, that the ultradecisive weapons, nuclear, bacteriological and chemical, stocked in the arsenals of an increasing number of states, and the changed strategies and tactics based upon these weapons, will render World Wars I and II and Korea the last 20th century demonstrations of 19th century military skills.

The increasing use by the Communist world of subversion through globally directed unconventional military and guerrilla action, and the equally unconventional military assistance programs of the Free World developed to preclude this subversion, are dramatic demonstrations of the power of unused ultradecisive weapons. The form of future wars may be determined by unused weapons available to the contestants and not by the weapons actually employed.

A former member of a board of economic warfare in World War II, if recalled to his task in World War III, may find his mission different, his techniques unfamiliar and his tenure short. Indeed, there may be no need for his services. The maximum destruction with minimum effort which can be achieved with nuclear weapons may eliminate all economic warfare in a secondary policy role familiar in the past.

But if the adversaries do not join in a global nuclear Armageddon, a period of confrontation may ensue in which the participants seek a settlement by military means rather than by negotiation. No uncon-

ditional capitulations might be sought in order to avoid a "last ditch" use of ultradecisive weapons by a desperate antagonist at the edge of defeat. Under these circumstances, military operations might be of a "holding" or stabilizing nature with much emphasis upon economic warfare or similar devices to produce the decisions desired. Economic warfare may dominate in a primary policy role. Military operations may assume secondary importance; as would supporting economic measures in this event.

The economic measures developed to support military "holding" or "stabilizing" operations probably would be selected with a view to their immediate impact. Time, or the risk of exposure to the use of ultradecisive weapons, will be critical. Blockade, for example, would be selective rather than general in nature, designed to delay the development, production, installation and delivery to target of the unused ultradecisive weapons producing the stalemate. The Cuban Quarantine of 1962 suggests the form and intensity such interdictions of critical weapons and materials might take. Because of the critical time element, the economic warfare posture, even in a secondary policy role, probably would be offensive rather than defensive. In this context economic sorties might reasonably be preferred to the delays, uncertainties and potential for miscarriage of economic warfare by protracted harassment.

If ultradecisive weapons, particularly nuclear types, are used on a limited basis, such as for military tactical purposes, but strategic use of these weapons is considered probable by the participants, either on a limited or general scale, the nature of economic warfare may differ from that in the confrontation in which total defeat of the adversary is not an aim. Economic warfare as a secondary policy device would be likely to exceed in importance its concomitant use in a primary policy role. Protracted harassment would be the prevailing technique with enhanced interest in economic sorties for speed, control and direction.

The demands of neutrals for trade and other privileges, to which much attention was directed by economic warfare strategists during World War II, may be modified profoundly in a nuclear military context. The trend is likely to be towards "open" or "effectively neutral" states.

Not only will this simplify the international legal problems of the economic warfare strategist, but there may be much "self regulation" by the neutrals. An open state is likely to maintain total boycotts and embargoes upon trade with belligerents and assiduously police the commercial transactions of its nations to avoid identification with any combatant.

Instead of action to interrupt neutral trade, the belligerents might

encourage it. Discriminations might arise which could not be prevented effectively by a nonparticipant, the former sanction of threatened participation being made too costly by the threat of nuclear annihilation.

Assuming no effort is made by one nuclear antagonist to manipulate the population of the other, neutrals sharing land boundaries with belligerents, or those readily accessible by sea or air and which also possess food surpluses, may nevertheless become sanctuaries for elements of the belligerent noncombatant populations. As hostages, these noncombatants will tend to insure the neutral against attack by their state of origin. Since all belligerents might reap advantages from similar havens, a form of "reciprocity by hostage" might render the sanctuaries effectively inviolate.

Trade in food, medicines and similar civilian items potentially of military use might be encouraged among these neutral havens despite the risks of military benefit to an antagonist. Rationing or metering the trade between neutrals might cease to be of major concern to the belligerents.

On the other hand, those neutrals which either are not sanctuaries for noncombatants, or which do not have a geographic position or economy potentially qualifying them to perform this function, might be subjected to the types of restraints upon neutrals imposed by the belligerents during World War II. There would be no effective way in which the neutral could prevent this discrimination.

Efforts might be made to manipulate the population of an adversary. The enemy population might be induced to concentrate to present a remunerative nuclear target. Dispersion might be forced to place a burden upon the communications and supply of the adversary. An effort might be made to panic the adversary population to divert the opposing military strength for police or other purposes.

An example of the latter maneuver is a strategic nuclear feint. If a belligerent is prepared to risk a preclusive nuclear strike, it might warn the population of its antagonist of nuclear attack on a date and place designated, promising immunity to adjacent neutral areas. This maneuver would capitalize upon several related factors: (1) Lack of defenses to nuclear attack by the adversary; (2) Mobility of the population—possession for example of private means of transportation; (3) Lack of communication between the adversary power elite and political mass; (4) Lack of police control; and (5) Susceptibility of the population to panic.

A similar technique has been used anticipatory to bombardment with conventional weapons. Unnecessary loss of life was avoided and the industrial production, transportation and communications of the enemy were disrupted.

Economic action supporting a strategic nuclear feint would encourage the flow of supplies into adjacent neutral areas, minimize the opportunity for transshipment and stockpiling of these supplies in the territory of the adversary, and decrease the flow of supplies directly to the hostile territory from nonadjacent neutral areas. A supply situation would be sought which made the adjacent neutral attractive for refuge and precluded the effective care of refugees within the hostile territory. Protracted harassment, probably in the form of a blockade of food and medical supplies would be imposed on hostile ports. Preventing transshipment of these materials imported into adjacent neutral territory would be most effectively accomplished by economic sorties: decisions not to transship being required by the neutral power elite.

Population concentrations in the territory of the enemy might be accomplished by limiting the transport of food and medicines to adjacent neutrals and metering the importation of these items into hostile territory to create a marginal level of supply requiring close central control and a tendency by the enemy population to gravitate to these control centers. Blockades, a form of protracted harassment imposed upon hostile shorelines, would figure prominently in support of this strategy.

When the military context is dominated by unconventional and subversive violence, such as guerrilla warfare which has been an important feature in military relations between the Free and Communist Worlds, economic warfare by protracted harassment, defensively or offensively, becomes of decreased value. A premium lies in careful definition of the critical power elites which are targets for economic action and careful assessment of the economic devices likely to influence decisions by them. Protracted harassments, such as denials or withdrawals of foreign aid, often prejudice stability within a state subject to subversive action and contribute to the effectiveness of hostile subversive violence. The economic sortie thus is likely to play an important role either as a primary or secondary policy device in these confrontations.

It is possible that in many military operations whether one form of economic warfare or the other is most effective to support the military action may not be a critical question. The economic warfare form selected, for example, may be one enhancing secrecy of the military plan.

Uncertainties concerning the variations in condition and form possible in future military warfare; the probability, in fact, that strategies and tactics will change in many different aspects in the future; must necessarily qualify any judgment that economic warfare by protracted harassment in a military context is obsolete. Since

diverse requirements, other than simple effectiveness of the action, have been imposed upon economic warfare in a secondary policy role in the past, one may expect these requirements to be equally diverse in the future.

But if economic warfare by protracted harassment is not fully obsolete in a military context as a secondary policy device, protracted harassment as a generally employed technique under these circumstances is certainly obsolescent. The patent limitations of economic warfare by protracted harassment as a primary policy device, in a military context or otherwise, have been fully detailed. The economic sortie promises to emerge as an increasingly useful technique in military or nonmilitary contexts. And it is in economic warfare by economic sortie that the knowledge, skills and other resources possessed or controlled by naval officers can be used in the national interest with maximum advantage.

B. THE NAVAL DECISION MAKER IN ECONOMIC WARFARE: LAWMAKING DURING ADMINISTRATION

Effective development and implementation of economic warfare policies in the future, whether economic warfare techniques are employed in a primary or secondary policy role, are likely to depend upon the ability of the economic warfare strategist to *use* law. This strategist will often be a naval officer—either making economic warfare decisions or advising others making these decisions.

An ability to use law consciously and effectively requires recognition by the strategist and others who control him that men *do* use law to define ends for action and to attain these ends. Recognition is also important that each *use* of a legal institution necessitates reshaping the institution to a degree conducive to attaining the end and fitting the new factual context in which the institution is applied. Conversely, the degree of deviation from past ends or goals and the degree of change in the factual and intellectual context in which the policy is formulated and applied determines the degree of reshaping of the legal institution necessary to effect the policy. New “law” is made as old “law” is administered.

But in this concentration upon the engineering or operational features of “lawmaking,” the strategist must not ignore the seismic changes in human relations which changes in legal institutions produce. Each legal change sets in motion a complex vibration of elements in human relations. These may range from those substantially undetectable to those that are catastrophic. The economic warfare strategist should foresee and weigh the importance of these shifts.

To introduce the kinds of problems faced by a legal strategist in

economic warfare, two cases will be presented, analyzed and compared. Both of the cases arose a few months apart in the early days of the American Civil War. Novel fact situations were boiling up from the breach in the country as never before in American history. Problems of a complexity unparalleled until the present decade were being presented for decision.

In one case, the *use* of law—by a General—accomplished his economic warfare object. The persons affected accepted his use of law with varying degrees of grace. His theory was thoroughly discredited before the Civil War was over. But this was not until the aim of the General had been achieved. Indeed, his legal strategy succeeded beyond his wildest expectations.

In the second case, the *use* of law by a Naval Captain failed of acceptance at the time—as did his economic warfare effort. The Captain was well ahead of his day. The law he tried to make may be the law currently. But impact upon the present, rather than upon the future, is the aim of the legal strategist. He does not seek to erect a legal pyramid to endure forever. He merely designs and lays the sturdy legal foundation for a temporary structure.

1. Butler's Law of Contraband

On the day Virginia seceded from the Union in 1861, three escaped slaves came within the lines of Union Major General B. F. Butler at Fort Monroe. The slaves belonged to Colonel Mallory, Confederate commander at Hampton. They had been used before their escape to construct a battery at Sewall's Point.

General Butler was not a professional soldier. In his short active service prior to secession, he had been noted for his innocence both of the complexities of military science and tactics and of the requirements of Army Regulations. But for dealing with the legal complexities of slavery, he had been well trained in the rough and tumble of the hustings in Lowell, Massachusetts, where he had practiced law and been active in politics before achieving military high command.

Thus, when Major Carey, commander of the Confederate picket at Hampton, came under a flag of truce to retrieve the fugitives, Butler was amply prepared to receive him. Assisting slaves to escape was a felony under the Fugitive Slave Law.²² But Butler had no intention of returning the escapees. He later described his discourse with Major Carey as follows:²³

²² 9 Stat. 462 (1850). The penalty for abetting the escape of a slave or withholding custody from his master was a fine not to exceed \$1,000 and imprisonment not to exceed six months.

²³ Butler, *Butler's Book*, 257 (1892).

(Carey) Do you mean to set aside your constitutional obligation to return them?

(Butler) I mean to take Virginia at her word in the ordinance of secession passed yesterday. I am under no constitutional obligation to a foreign country as Virginia claims to be.

(Carey) But you say we cannot secede, so you cannot consistently claim the negroes.

(Butler) But you say you have seceded, so you cannot consistently claim them. I shall hold these negroes as contraband of war, since they are engaged in the construction of your battery and are claimed as your property. The question is simply whether they shall be used for or against the Government of the United States. * * *

After Butler and Carey parted, Butler returned to his quarters, and as he walked along with a member of his staff, he stated:²⁴

* * * /T/he correctness of my law was discussed by Major Haggerty, who was, for a young man, a very good lawyer. He said he doubted somewhat upon the law, and asked me if I knew of that proposition having been laid down in any treatise on international law.

‘Not the precise proposition,’ said I, ‘but the precise principle is familiar law. Property of whatever nature, used or capable of being used for warlike purposes, and especially when being so used, may be captured and held either on sea or on shore as property contraband of war. Whether there may be a property in human beings is a question upon which some of us might doubt, but the rebels cannot take the negative. At any rate, Haggerty, it is a good enough reason to stop the rebels’ mouths with, especially as I should have held these negroes anyway’. * * *

When noised abroad, Butler’s decision caused a mass exodus of slaves to Fort Monroe. There Butler promptly put them to work and appointed a “Commissioner of Negro Affairs” to supervise them. He then reported his action to Lieutenant General Scott with a duplicate of his letter to the Secretary of War.

General Scott was apparently shocked into silence. The Secretary of War responded with “no directions to pursue any different course of action from that which I had reported to him, except that I was to keep an accurate account of the value of their work.”²⁵

Reflecting upon his use of law, which was received rather frigidly in 1861 by all except the slaves, Butler stated many years later:²⁶

²⁴ *Ibid.*, 258.

²⁵ *Ibid.*, 259.

²⁶ *Ibid.*, 259.

* * * Our troops could not act as a marshal's posse in catching runaway negroes to return them to their masters who were fighting us at the same time. What ought to be done? Nobody made answer to that question. Fortuitously it was thrust upon me to decide what must be done then and there, and very fortunately a few minutes' thought caused to flash through my mind the plausible answer at least to the question: What will *you* do? I do not claim for the phrase 'contraband of war,' used in this connection, the highest legal sanction, because it would not apply to property used or property for use in war, as would a cargo of coal being carried to be burned on board an enemy's ship of war. To hold that contraband, as well might be done, by no means included all the coal in the country. It was a poor phrase enough; Wendell Phillips said 'a bad one'. My staff officer, Major Winthrop, insisted it was an epigram which freed the slaves. The truth is, as a lawyer I was never very proud of it, but as an executive officer, I was much comforted with it as a means of doing my duty.

With allowances for inaccuracies in General Butler's second thoughts after thirty years, his formulation of "contraband" as applied to slaves was an economic warfare measure second in importance only to the declaration of blockade by the Union. It was the touchstone by which the Confederate labor force was lured away in the eighteen months preceding the Emancipation Proclamation. During this period, Union military and naval power was at its nadir. Butler's economic warfare served in part to counterbalance the superior Confederate leadership and fighting qualities until Union military power was fully mobilized.²⁷

2. Wilkes and The Trent

At the time General Butler was employing the slaves of Colonel Mallory at Fort Monroe, U.S.S. *San Jacinto*, Lieutenant D. M. Fair-

²⁷ Bruce Catton, appraising General Butler's use of law a century later, sees effects in his decision beyond the prosaic margin of economic duress. He writes:

* * * Meanwhile, other men would have their say. One of them was Ben Butler, of Massachusetts, a man seemingly appointed now, in the infinite Providence of God, to cast his own strange ray of revealing light on the way the war must go. To the relief of everyone, Butler had been lifted out of Maryland and had been set down by the Federal War Department, at Fort Monroe, at the tip of the Virginia Peninsula. Here, trying to be an administrator and a warrior, succeeding imperfectly in each, he would bring up for definition the thing both sides did not want mentioned just now—the deep underlying wrong of slavery. Meaning nothing more than a good lawyer's shrewdness, he helped to define the war. * * *. Catton, *The Coming Fury*, 394 (1961).

fax commanding, was cruising the West Coast of Africa on the hunt for slavers.²⁸ Captain Charles Wilkes, a veteran officer, explorer of the Antarctic, pacifier of the Fijis, discoverer of Wake Island, a scientist of great merit who prepared charts later used by the United States Navy in the South Pacific in World War II, but withal a brilliant enigma, assumed command of *San Jacinto* in August. His orders were to return to the United States to participate in the DuPont Expedition against Port Royal.²⁹ The attack upon Port Royal was scheduled for November 4, 1861.

Delaying his return in a fruitless search for the Confederate cruiser *Sumter*, Wilkes touched at Cienfuegos, Cuba. There he learned from a newspaper that Mason and Slidell, Confederate Commissioners, had reached Havana by blockade runner.

Hastening to Havana to capture the blockade runner on its return, but arriving too late, Wilkes nevertheless discovered through the agency of Lieutenant Fairfax, now his executive officer, who talked to Mason in a Havana hotel, that the Commissioners, their secretaries and families, were to sail on the British steamer *Trent* on November 4, 1861, for St. Thomas en route to Europe. Mason, posted to England, and Slidell, posted to France, were to negotiate for recognition of the Confederacy.

In his report to Secretary of the Navy Welles, made on 16 Novem-

²⁸ Lieutenant Fairfax was a Virginian who had been appointed a midshipman from North Carolina. He had taken part in the capture of Lower California during the Mexican War. At the *Trent* incident Lieutenant Fairfax was forty years old and had been a Lieutenant since 1851.

His subsequent service for the Union was highly distinguished. He was in command of *Cayuga* with Farragut at New Orleans in 1862 and commanded the monitor *Nantucket* in DuPont's attack on Charleston in 1863. Fairfax became a Rear Admiral after the war. He died in 1894.

²⁹ For a biography of Wilkes, see Henderson, *The Hidden Coasts* (1953). Although his failure to report for the DuPont Expedition against Port Royal is puzzling, Wilkes has been handled with unnecessary roughness for his part in the *Trent* affair. This stems in part from the scathing indictment of his conduct by Admiral Porter in his *Naval History of the Civil War*, 63 *et seq.* (1886), and critical comments by Professor Soley in *The Blockade and The Cruisers*, 176 *et seq.* (1890).

Correspondence and reports filed concerning the *Trent* may be found in *Official Records of the Union and Confederate Navies in the War of the Rebellion*, Series 1, Volume 1, 129 *et seq.* (1894), referred to hereafter as *Official Records*. Additional correspondence may be found in Harris, *The Trent Affair* (1896).

A recent and lively account of the incident may be found in I Jones, *The Civil War at Sea*, 292 *et seq.* (1960). Jones states a search was made for dispatches on the *Trent*. This was not the case, there being no examination even of the baggage of the Commissioners until they arrived in Boston. Their baggage was then examined by orders of Colonel Dimick at Fort Warren.

ber 1861, Captain Wilkes stated the process by which he arrived at his decision to seize the Commissioners:³⁰

* * * When I heard at Cienfuegos, on the south side of Cuba, of these commissioners having landed on the island of Cuba, and that they were at the Havannah, and would depart in the English steamer on the 7th of November, I determined to intercept them, and carefully examined all the authorities on international law to which I had access, viz, Kent, Wheaton, Vattel, besides various decisions of Sir William Scott and other judges of the admiralty court of Great Britain, which bore upon the rights of neutrals and their responsibilities.

The governments of Great Britain, France and Spain having issued proclamations that the Confederate States were viewed, considered and treated as belligerents, and knowing that the ports of Great Britain, France, Spain and Holland in the West Indies were open to their vessels, and they were admitted to all the courtesies and protection vessels of the United States received, every aid and attention being given them, proved clearly that they acted under this view and decision, and brought them within the international law of search and under the responsibilities. I therefore felt no hesitation in boarding and searching all vessels of whatever nation I fell in with, and have done so.

The question arose in my mind whether I had the right to capture the persons of these commissioners, whether they were amenable to capture. There was no doubt I had the right to capture vessels with written dispatches; they were expressly referred to in all authorities, subjecting the vessel to seizure and condemnation if the captain of the vessel had knowledge of their being on board, but these gentlemen were not dispatches in the literal sense, and did not seem to come under that designation, and nowhere could I find a case in point. That they were commissioners, I had ample proof from their own avowal, and bent on mischievous and traitorous errands against our country, to overthrow its institutions and enter into treaties and alliances with foreign states, expressly forbidden by the Constitution. * * *

I then considered them as the embodiment of dispatches, and as they had openly declared themselves as charged with all authority from the Confederate Government to form treaties and alliances tending to the establishment of their independence, I became satisfied that their mission was adverse and criminal to the Union, and it therefore became my duty to arrest their progress and capture them, if they had no passports or papers

³⁰ *Official Records*, 143.

from the Federal Government, as provided for under the law of nations, viz, that foreign ministers of a belligerent on board of neutral ships are required to possess papers from the other belligerent to permit them to pass free. * * *

Wilkes did not disclose his plan to any of his officers until *San Jacinto* sailed from Havana on November 2. He then disclosed his plan to Lieutenant Fairfax. Many years later, Lieutenant Fairfax wrote:³¹

When Captain Wilkes first took me into his confidence, and told me what he proposed to do, I earnestly reminded him of the great risk of war with these two governments, supported as they were by powerful navies. * * *

On November 3, Wilkes put into Key West, searching for other vessels which might aid him in intercepting *Trent*. Fairfax there suggested he consult with Judge Marvin, United States District Judge in Key West, "one of the ablest maritime lawyers," but Fairfax noted:³²

* * * I soon saw * * * that he had made up his mind to intercept and capture the *Trent* as well as to take possession of the Commissioners, and I therefore ceased to discuss the matter. * * *

Wilkes then took station in the old Bahama channel and intercepted *Trent* on November 8. Fairfax writes:³³

* * * As the next in rank to Captain Wilkes, I claimed the right to board the mail packet. Captain Wilkes fully expected that I would tender my services for this 'delicate duty' and rather left to me the plan for carrying out his instructions. * * * The instructions issued to Lieutenant Fairfax were in part:³⁴

* * * You will have the second and third cutters of this ship fully manned and armed, and be in all respects prepared to board the steamer *Trent*, now hove to under our guns. On boarding her you will demand the papers of the steamer, her clearance from Havana, with the list of passengers and crew. Should Mr. Mason, Mr. Slidell, Mr. Eustis, and Mr. Macfarland be on board, you will take them prisoners and send them on board this ship immediately, and take possession of her as a prize. I do not deem it will be necessary to use force, that the prisoners will have the good sense to avoid any necessity for using it, but if they should, they must be made to understand that it is their own fault. They must be brought on board.

All trunks, cases, packages and bags belonging to them you

³¹ II *Battles and Leaders of the Civil War*, 136 (1884).

³² II *Battles and Leaders of the Civil War*, 135, 136 (1884).

³³ *Ibid.*, 136.

³⁴ *Official Records*, 131.

will take possession of, and send on board this ship. Any dispatches found on the persons of the prisoners, or in possession of those on board the steamer, will be taken possession of also, examined and retained if necessary. * * *

But Fairfax states he decided: ³⁵

* * * /N/ot to do anything unnecessary in the arrest of these gentlemen, or anything that would irritate the Captain of the *Trent*, or any of his passengers, particularly the commissioners—lest it occur to them to throw the steamer on my hands, which would necessitate my taking her as a prize. * * *

When he boarded *Trent*, and arrested Mason and Slidell and their secretaries, Lieutenant Fairfax acted tactfully and with forbearance. His forbearance was such that he neither insisted upon examining the papers and passenger list of the vessel, when the master refused his request, nor did he conduct a search for dispatches. Dispatches in fact were on board and were delivered ultimately in England by a Confederate agent. So great was the disorder among the passengers on *Trent* and so uncooperative were the attitudes of her officers that Fairfax was relieved to be able to remove the commissioners, their secretaries and their baggage without physical violence.

When he returned to *San Jacinto* Lieutenant Fairfax reported to Captain Wilkes that he: ³⁶

* * * /H/ad not taken the *Trent* as a prize, as he had instructed me to do, giving certain reasons which satisfied him; for he replied, ‘inasmuch as you have not taken her, you will let her go’ or ‘proceed on her voyage’. To make clear one of these reasons, I should before have mentioned that Captain Wilkes, while at Havana, had learned more definitely of DuPont’s fleet, from which he inferred its destination, for of the Southern ports the larger vessels could only enter Port Royal. He directed me ‘to refit our battery and get the *San Jacinto* ready in all respects for battle’ adding that he would ‘join DuPont in time to co-operate with him’. (As it was, Port Royal fell the day before we boarded the *Trent*, as we learned on our arrival off Charleston.)

The reasons I assigned to Captain Wilkes for my action were: First, that the capture of the *Trent* would make it necessary to put a large prize crew (officers and men) on board, and thus materially weaken our battery for use at Port Royal; secondly, that as there were a large number of women and children and mails and specie bound to various ports, the capture would

³⁵ II *Battles and Leaders of the Civil War*, 135, 136 (1884).

³⁶ *Ibid.*, 140.

seriously inconvenience innocent persons and merchants; so that I had determined before taking her to lay this matter before him for serious consideration.

I returned immediately to the *Trent* and informed Captain Moir that Captain Wilkes would no longer detain him and he might proceed on his voyage.

Fairfax added:³⁷

I gave my real reasons some weeks afterward to Secretary Chase, whom I met by chance at the Treasury Department, he having asked me why I did not obey Captain Wilkes' instructions. I told him it was because I was impressed with England's sympathy for the South, and felt she would be glad to have so good a ground to declare war against the United States.

When the Commissioners were taken, the military fortunes of the Union were at a low ebb. The need in the North for a hero was great. Captain Wilkes promptly received public acclaim. But his fall from official grace, if not in public exaltation, was rapid when the *Trent* affair received a second look.

Secretary Welles was mildly reserved and apprehensive from the beginning. Montgomery Blair sourly suggested that Wilkes be required to transport the Commissioners to England. Secretary Seward wrote the United States Ambassador at the Court of St. James that Wilkes had seized the passengers without instructions and the matter had not been discussed in the Cabinet.

European lawyers regarded seizure of the Commissioners as a violation of international law. The British, without waiting for diplomatic adjustment, commenced preparations for war.

Secretary Seward, in December, stated to the British that Wilkes had acted without orders and had erred in failing to bring the *Trent* in for adjudication. The Commissioners and their secretaries were released with their baggage, delivered to a British vessel, and continued their missions.³⁸

An emotional atmosphere which eased the labors of Confederate supply agents developed in both England and France. The anti-slavery bias of the European bourgeois was counteracted to a degree by concern over Wilkes' apparent adaptation of the high-handed British treatment of neutral shipping.

Riding a wave of popular acclaim, Wilkes obtained a promotion and command of the James River Flotilla. Shortly thereafter he ended his naval career in command of the West Indies Squadron,

³⁷ *Idem*, 40, fn.

³⁸ A discussion of the efforts of Mason and Slidell upon reaching their posts may be found in Owsley, *King Cotton Diplomacy*, 224 et seq. (1931).

being harried down in 1863 by the British and relieved from command for diplomatic reasons.

3. Lawmaking by Butler and Wilkes Compared

Unlike the law made by Butler, which proved effective economic warfare for the Union, the law made by Captain Wilkes was applauded in the North but then repudiated by his contemporaries. His seizure of *Trent* did nothing to advance the political cause of the Union. Why did one decision serve the cause supported and the other not?

Butler was *using* law from the time he started speculating upon alternatives open for the disposition of Colonel Mallory's slaves. He appraised instinctively the competing interests involved and considered how his possible decisions might be received by the persons affected.

Colonel Mallory could not sue Butler in a Northern Court. He might sue in a Southern Court if Butler were captured, if the Confederacy won, or if the slaves were not emancipated. These possibilities seemed comfortably remote.³⁹

No foreign owners were involved. Although Colonel Mallory might be considered a foreign owner, there was no chance that his claim might be adjudicated before an international tribunal or that he could persuade England, France or some other third state to espouse his claim.

Butler may have committed a felony under Federal Law by refusing to return the slaves. But this was a matter of interpretation of the Fugitive Slave Law, which did not cover specifically the case of "contraband" slaves. The United States Attorney General was not likely to prosecute Butler for a violation of the law in any event. The Fugitive Slave Law was a "Southern" law and unenforceable in the North in 1861. Butler, a senior Major General and a prominent Massachusetts Democrat to boot, was hardly a target for a Republican Attorney General at a time when the Republicans were seeking Northern Democratic support.

Judicial review of his action being unlikely, Butler's only concern was with administrative review by his superiors. This review might be sought by the Confederates, on the theory Butler had violated the rules of land warfare by taking private property, or perhaps by antislavery or proslavery elements in the North disapproving his decision.

³⁹ Butler was sued after the war for a number of actions taken during his command at New Orleans, including looting the sword of General Twiggs. He defended these actions successfully.

Quite clearly he would have administrative problems if he gave the fugitives back; and would have political problems, as well, if he ran for postwar office in Massachusetts. He thus decided to retain the slaves and probed for doctrine upon which to rest his case.

Butler exaggerates when he suggests in his memoir that the "contraband" analogy simply popped into his mind during his argument with Major Carey. The Confederates treated slaves as property for some purposes and not for others. A slave was property and could be transferred. But a slave was counted as a person for apportioning Congressmen.

These and other inconsistencies in the slave law had been publicized before the war. Butler simply played upon the fact that this inconsistency had progressed to the margin of logical tolerance.

Contraband, then and now, is limited to property. If the Confederates contended the slaves were not contraband, an inference might be drawn that the slaves were not property, since Butler could prove hostile use if not interception during carriage.

Too many distinctions concerning the legal status of slaves had been made before 1861. Few officials, North or South, other than Butler, were prepared to "rock the boat." His formula effectively, as Butler crudely put it, "stopped the rebels' mouths."

Butler might have called "a spade a spade" and declared the slaves captured public property, like captured pieces of artillery. They had been converted to the public use of the Confederacy for work upon fortifications. But the United States might find itself with title. This would be embarrassing.

If Butler declared the slaves captured private property, the United States might have to offer indemnity to their owner after the war. About thirty years before the United States had argued successfully before the Tsar of Russia as arbitrator that England was liable for slaves carried away during the War of 1812.

"Contraband" was a happy inaccuracy. Title to the slaves was left in suspense. The abolitionists (other than Wendell Phillips) temporarily were satisfied in Butler's Massachusetts constituency. Officials in Washington, yet unready to emancipate the slaves, were mollified. The rebels' "mouths were stopped." Butler's retention of the slaves for work at Fort Monroe and a program of further attrition of the Confederate labor force were justified.

His allegedly *ad hoc* formula, although unsound analytically, and given harsh treatment by legal scholars since, worked admirably as an acceptable fiction until emancipation. This occurred within eighteen months. Although Butler's formula was then obsolete, it stands as his most enduring monument.

No one can say with assurance today why Captain Wilkes felt

bound to seize the Commissioners on the *Trent* when he should have been on his way instead to join the DuPont Expedition. Some writers have suggested he sought an opportunity for a dramatic act before his retirement, which he then believed was pending. Quite possibly his decision was conditioned by an element of Anglophobia, shared by many American naval officers of his generation, and sharpened both by his disputes with Ross concerning their conflicting claims to discoveries in the Antarctic and by his kinship with John Wilkes, the persecuted British editor.⁴⁰ His boyhood friendship with Slidell, superseded by frigidity as the prospect of secession loomed, may have had some bearing.

But clearly Captain Wilkes, unlike General Butler, had no feel for the way in which law worked or for the dimensions of the political context in which his decision was made. This was not his fault. He was a naval officer and scientist—not a lawyer. Commanders afloat at the time the Commissioners were seized had no instructions by the Navy Department concerning neutral rights.

The Secretary of the Navy could not, of course, have foreseen the necessity of haste to convey such instructions to Wilkes. He believed Wilkes was joining the DuPont Expedition and not on a junket of his own, pursuing British packets.

Wilkes could not reasonably consult with Judge Marvin as Lieutenant Fairfax suggested. Judge Marvin would be judge of the prize court before which *Trent* would be brought if seized. If Judge Marvin disqualified himself, *Trent* would have to be carried by its prize crew to a less convenient port.

As Wilkes saw the matter, law was an obstacle standing between him and the Commissioners. If he could find a hole through this obstacle, like a break in the pack ice through which he drove his wooden ships in his exploring days in Antarctica, he could pass through and seize the Commissioners.

He found this hole in the treatment of dispatches by Sir William Scott. But instead of seeking a principle underlying Scott's decisions, as Butler probably would have done, Wilkes worked solely by factual analogy, identifying written dispatches with dispatches borne in the cortical processes of the Commissioners.

This was a bold scientific approach to the matter; but one which would have had more appeal in 1961 than in 1861. Furthermore, Wilkes seemingly gave no consideration at any stage of the transac-

⁴⁰ John Wilkes, great uncle of the Captain, was editor and owner of the newspaper, *The North Briton*. Wilkes was imprisoned in 1763 for a libel upon George III and became both odious to the monarchists and a hero in the colonies. Wilkes-Barre, Pennsylvania is named for Wilkes and Issac Barré, his contemporary in Parliament who also supported colonial claims.

tion to the possible responses of persons with interests in the conflict to his interception and treatment of *Trent*, her crew and passengers.

The matter, as Wilkes saw it, was one between the authorities on international law which he consulted and his conscience as a patriot. When these could be reconciled, he regarded his legal problem as settled. He viewed law as an obstacle and legal skill as a tool to force an entrance. He failed to recognize a problem in "legal strategy" or management—and this problem as a continuing one, not to be solved by any single decision.

His decision to intercept *Trent* required more than a single mental act. Wilkes should also have set the factual matrix for authoritative decisions by others and been prepared to persuade others to accept his treatment of the facts.

Setting this factual matrix required his careful supervision of Lieutenant Fairfax, his boarding officer. Fairfax, a seasoned officer, was an aggressive advisor. Wilkes should have recognized that Fairfax was seeking to impose his own policy upon his commander by setting his own factual matrix. If Fairfax failed to inspect *Trent* for dispatches and contraband items and failed to seize *Trent* when the Commissioners were discovered on board, Wilkes should have ordered him back with the force to do these things.

The requirement under the circumstances for an adjudication was also clear. Wilkes' failure to go beyond a simple factual analogy in making his decision—his failure to analyze even the interests involved in the confrontation—could have been compensated to a degree by review of the facts by an impartial judge. In 1861, this required seizure of *Trent* and her diversion to Key West, or some other port, where the propriety of the interdiction could be passed upon by a judge having admiralty jurisdiction.

Wilkes had directed Fairfax to seize *Trent*. But his failure to insist upon compliance with his order meant that Fairfax, who either misunderstood or disapproved the treatment of law by Wilkes, set a factual matrix placing Wilkes and his superiors in an untenable position.⁴¹

4. The Naval Officer and Legal Strategy in Economic Warfare

A naval officer may participate in legal strategy in economic warfare in a context other than that illustrated by Wilkes' interception of *Trent*. He may, for example, participate in "lawmaking" on a formal level.

⁴¹ It has been argued that war with England was avoided by the Union because *Trent* was not seized and diverted. An adjudication, however, would have provided a quick settlement of the issues and one probably satisfactory both to the Union and England.

The officer may serve as a member of a court or commission dealing with a narrow issue produced by economic warfare. He may serve as a delegate to an international convention considering legal problems produced by economic warfare in a broader perspective.

Usually, however, the naval officer's function in lawmaking on a "formal" level will be indirect or advisory. Thus, he may testify before a Congressional Committee which seeks to define an economic warfare problem and devise legislation to be used in an effort to solve it. His experience with similar problems and ways to solve them may be reflected in the report of the Committee and ultimately influence laws passed by the Congress.

In his appearances as a witness before Courts, the ability of a naval officer to influence the development of law relating to economic warfare is appreciably less than before legislative Committees. Not only are the issues before Courts typically narrow, but rules of evidence and limitations upon the lawmaking functions of a Court may limit the ability of the officer to express his views freely. His judicial influence thus tends to be negative.

In the *Corfu Channel Case*, for example, the refusal of a British naval witness to divulge the contents of British secret Order XCU may have prevented the International Court of Justice from introducing into international law the civil law doctrine of "misuse of a right." This doctrine was discussed in the dissenting opinion of Judge Alvarez.⁴² "Negative influence" is an important function in the preformulatory stage of lawmaking. At this stage poor or unworkable policies can be stifled at birth.

But while lawmaking through administration is the most important and obvious way in which a naval officer may become involved in legal strategy in economic warfare, this area of legal activity, paradoxically, has been the most difficult for military officers and their civilian superiors to comprehend and appreciate. In dealing with *Trent*, Captain Wilkes and Lieutenant Fairfax sensed this lawmaking function only dimly. Not many military officers of their day possessed the flair for management of law and flawless effrontery which served General B. F. Butler well in many trying situations.

It has been pointed out hitherto in this Chapter that certain advantages stem from the use of economic sorties as preferred economic warfare techniques. Economic sorties also are managed most readily at low policy-making levels.

One reason for this flexibility at low policy levels is that legal

⁴² I.C.J. Rep., 1949, Judgment of April 9, 1949 (Merits) 48. " * * * /I/n virtue of the law of social interdependence * * * misuse of a right should be transported into international law."

doctrine, much of it having been developed in defensive economic warfare and thus not amenable to ready use in offense, becomes increasingly difficult to relate to any policy process as the facts of a specific conflict are approached. The lower the policy level of the administrator, the greater his independence to take immediate action to deal with facts confronting him.

But while this "low level" administrator can take immediate action, which policy makers on high levels may be unable to do with equal speed, he bears the burden of limited factual perspective. He has difficulty, for example, in relating the action which he undertakes with other action planned or undertaken at the same time.

It is not enough for him to assume that current national legal doctrine or international legal doctrine is keyed to economic warfare by protracted harassment; and that economic sorties, by presenting situations to which the existing legal doctrine is inapposite, will give him freedom of action. He will find, instead, that legal institutions are being used at various levels of authority to *coordinate* action, *persuade* allies and adversaries, and *guide* subordinates; and, in this process, legal doctrine (or formal statements of authoritative policy) are being formulated, revised and abandoned constantly.

Thus, while a naval officer at a relatively low policy-making level may enjoy some freedom of action through the employment of economic sorties, his skill in the use of law to persuade his superiors and adversaries to accept his economic action also plays a vital role. Likewise, it is incumbent upon his superiors to ensure that the "low level" policy maker in immediate contact with the conflict events has adequate intelligence of plans and concomitant action to permit his rational choice of economic warfare alternatives.

The "low level" policy maker, the usual policy position of a naval officer engaging in economic warfare, finds himself pushed towards legal strategy of a defensive nature. He has much latitude for initiative but must be prepared to defend the economic action which he undertakes. He becomes a lawmaker to the extent his action is accepted by those who can make authoritative decisions concerning the conflict. The naval officer is a decision maker—but seldom does he make final decisions. This Wilkes forgot and Butler remembered.

What are the basic features of this administrative process in economic warfare? What are the principal problems of persuasion confronting a naval officer discharging economic warfare duties?

The Administration of Economic Warfare Policies

The policies which a naval officer will have to apply or consider in conducting economic warfare, whether these are described as "policies," "laws," "directives" or "orders," may be viewed functionally as

“activating,” “limiting” or “deactivating.” This functional description is meaningful only if “laws,” “orders,” or whatever level of authoritative decision making is chosen, are accepted as elements of a process for political management.

“Lawmaking,” for example, describes an “endless chain” of inter-related decisions within a group sufficiently matured to have developed a “formal authority” or “official decision issuing” institution. The chain is endless because the effects of executing a “legal policy” influence its appraisal and reformulation.

An “activating” law is one directing someone to do something. The actor is sometimes implied in the law and not expressed. For example, a law may state simply that if “X” does act “A,” “B” and “C” in a particular relationship, “X” will receive a specified punishment. The policemen, magistrates, jailors, judges, and perhaps executioners, who administer the law are not specified.

On the other hand, judgments by these unmentioned persons concerning the wisdom of “activating” law and what the formal “lawmaker” intended, will condition whether a particular person in the community is brought under the description “X” (whether the “law” applies to him) or whether he is found to have done “A,” “B” and “C” in the particular relationship required. The Bourbon law of treason was not in fact applied to Marshal Ney if his firing squad, through affection for him, agreed not to shoot him and permitted him to escape.

However, an activating law may designate an actor but not direct clearly what he is to do. Instead, the law may prescribe a general course of action.

This situation usually occurs when the “formal” lawmaker appraises the facts of a problem as too complicated or changing too rapidly to be handled by a detailed prescription of action. It is with reference to this type of “activating” law that “limiting” laws are of great importance.

A “limiting” law is one defining allocations of power. These, typically, are found in national or state constitutions and in charters of international organizations. “Limiting” laws are characterized by generalized and long-range goals, such as those expressed in the Tenth Amendment of the Federal Constitution. As the policy level approaches the conflict events, formal allocations of power, especially those based on legislative, judicial or executive functions, tend to coalesce. As applied to “activating” laws setting forth general prescriptions of action in complicated factual contexts, a “limiting” law may require ascertainable standards to guide the administrator. However, the more complicated the factual context and the closer the

policy maker to the conflict events, the less detailed the "limiting" standard required.

"Deactivating" laws are those which bring obsolete, unused or unwanted laws to an end. Terminating policy is one of the chronic and most difficult problems facing any community. It is not difficult to end obsolete or unused laws. But when an unwanted law is ended, which is neither obsolete nor unused, supporting conduct patterns may have been built around the law and these conduct patterns continue.

An alternative approach in terminating policy is to repeal by accretion through administrative interpretation. The law is gradually chipped away through failures to apply it or by applications unintended by the lawmaker. The supporting custom may then change gradually to conform to this changed use of law.

A naval officer conducting economic warfare usually will administer an "activating" law or order describing him and his colleagues as "actors" but not describing in detail the things to be done. In operations deemed by the President to be critical to National Security, such as the Cuban Quarantine of 1962, tightly centralized and detailed control may be exercised. However, this centralized and detailed control is unusual.

In typical naval economic warfare, the President might direct by executive order the naval blockade of a designated coastline. The time for commencement of the blockade will probably be indicated in the order by the President and other details perhaps set forth.

Within the naval establishment blockade instructions are either then prepared or prepared instructions are modified to apply to the facts of the conflict. These instructions will contain more detail than the executive order and are based upon forecasts of probable events.

The Fleet Commander charged with conduct of the blockade then issues these instructions, probably with elaborating detail, to his subordinate commands. By the time the instructions reach the captain of a blockading vessel or the commander of a blockading aircraft, the provisions will appear in two forms.

Stereotypes in Administrative Instructions

One form confers broad discretion upon the instructed officer. The framer of instructions cannot foresee with assurance events which might confront the administrator. A precise directive might be obsolete when formulated. The officer, consequently, must be given latitude for action. The provision is similar to an "activating law" which describes the actor and objective of action but does not direct in detail what the actor is to do.

A second form describes the action to be undertaken and the conditions for action. While the actor or actors may not be described precisely, as in some "activating laws," the lower the administrative level at which instructions issue, the greater the likelihood and necessity of exact description.

Provisions may be found conforming precisely to neither of these stereotypes. Indeed, as did Captain Wilkes in his interception of *Trent*, an officer may deem it necessary to act without instructions.

But if instructions issue, are received and followed, the distinction between stereotypes is relevant to "lawmaking" functions the administrative officer probably will perform. These "lawmaking" functions, in turn, shape problems of persuasion which must be solved to obtain formal community responses favorable to the coercive economic measure.

The lawmaking function of the officer may be principally "legislative"—he may function as a "rule maker." On the other hand, his function may be principally "adjudicative"—that is, he may function as a "rule applier."

With both stereotypes there is a potential requirement of "advocacy" or "persuasion." But while the requirement of "advocacy" may exist with both stereotypes, the *policy position* of the person to be persuaded tends to differ with the provision being applied.

When broad discretion is conferred by the instructions, the "lawmaking" function of the officer is primarily "legislative." He supplies necessary elements of an incompletely formulated policy. "Limiting laws" may curtail the ambit of discretion to make or complete policy which can be thus delegated or subdelegated. But "limiting laws" are not applied stringently in the complex and dynamic contexts in which military officers usually serve.

There is a secondary "adjudicative" lawmaking function when broad discretion is conferred. After the officer supplies the policy elements omitted by the framer of instructions, his primary function, he then appraises the facts confronting him and decides whether and how he should act. Law, on a modest scale, is made in the "adjudicative" process also.

Rather than conferring broad discretion the instructions may be in the general form: If "X" does acts "A," "B," "C" and "D" in a specified relationship, you will then do act "E." The framer describes the action and its conditions.

"X," "A," "B," "C" and "D" will never appear in the exact form the framer of instructions predicts. Nor will act "E" have precisely the consequences he anticipates. If the instructions remain in force, the events to which the instructions were first applied and the consequences flowing therefrom will not be repeated.

The instructed officer must thus conduct mentally an informal trial to determine whether the conditions for action are met. He attempts to foresee the probable consequences of action in the "different" context and whether these contribute to the objective sought by the framer of instructions. He finds facts and relates these to the plan he applies. The process, essentially, is "adjudicative."

A "legislative" function figures in a secondary role. The instructed officer reads meaning into the instructions from his experience. By contracting or protracting the wording of the instructions, in the light of his factual analysis, the officer decides whether to act—and if he does act, whether to perform act "E" or some variation.

The only advocacy required, whether the instructions are broad or narrow, may not exceed a simple explanation to an official superior. But economic warfare tends to present issues of critical national and international importance. A foundation for an argument or arguments to support favorable characterizations of the action by relevant communities should thus be prepared. Although the arguments may never be advanced, they nevertheless should be available if needed.

Reasons for Concern About Future Community Characterizations of Economic Warfare

Why should a naval officer charged with conducting economic warfare be concerned with "legality" of his action. A judgment about "legality" of an act when the act is done involves a forecast whether a relevant community will respond to the act; whether it will respond through use of its formal decision-making processes; and whether the judgment of the formal authority of the community will be that the act in question is "permissive" or "impermissive." Furthermore, a judgment about "legality," to be meaningful to an executive officer, must embrace a prediction whether the formal judgment will be implemented, if unfavorable, by action to attenuate the effects of the economic warfare policy considered.

Because of these variables, no one can say with assurance that an act is "legal" or "defensible" when done. There is an element of dynamic change both in legal institutions and the primacy of values sought. The "legitimacy" of action thus tends to be a product of "persuasion" of decision makers in a particular context.

This task of persuasion is most effectively handled by legally trained professionals. With other features in planning and executing economic warfare demanding close attention by a naval officer engaged in economic warfare, how then can the time of an officer without legal training rationally be allocated to considering "legal" features of the transaction?

One reason for attention to the legal features of an economic warfare policy at low administrative levels, whether the policy is being formulated or executed, is the bearing of an *implemented* community determination of "impermissiveness" upon the effectiveness of the action undertaken. Whether characterized by a community as "legal" or "illegal," an executed economic warfare plan has impact upon the environment and sets in motion a chain of events. But if an *adverse* community decision is rendered *and* implemented these effects may be attenuated. The degree of this attenuation depends upon the degree of concomitance of the community decision to the economic warfare act and the intensity and skill of implementation of the decision. If a community characterization is *delayed*, there is a diminishing possibility that the effects of economic action can be interrupted.

An economic sortie may avoid the full effect of an adverse community characterization. The sortie technique also tends to permit an effective withdrawal and redirection of economic action when required by an adverse community decision. But even when economic sorties are used, adverse community characterizations, producing when implemented, premature or forced abandonments of policies, also produce value losses in the state engaging in economic warfare.

When a community characterization of economic warfare is not rendered in substantial concomitance to the event, the prospect steadily decreases that such a decision will be rendered. Yet delayed characterizations do occur.

Although these characterizations have little effect upon the impact of an executed economic warfare policy, the element of delay complicates fact finding when an issue of personal civil or criminal liability of the officer who engaged in economic warfare is presented. Furthermore, in these delayed decisions there is a macrocosmic display of the "law-observing" image of the state waging economic warfare.

If the state is represented as a chronic "lawbreaker," by exaggerating the fiction of community participation in individual acts, this adverse global publicity may affect its diplomatic posture. For example, the delayed trial of Eichmann before an Israeli Court, involved a review, long after the events became obscure, of the anti-Semitic program of Nazi Germany. The attendant publicity produced much introspection in West Germany and contributed to ultimate West German recognition of Israel and consequent complications in West German relations with Arab States.

*What a Naval Officer Can Do About the
Legal Problems in Economic Warfare*

When a naval officer is sensitive to problems of "legality" in economic warfare, he will be aware that his is not the concern of a bystander but the concern of an active participant. What can he *do* about these "legal" problems?

First, he must understand the kinds of legal problems produced by naval activity in economic warfare in the past, the community levels at which solutions of these problems have been sought and the shape of the community solutions advanced. This book is devoted principally to development of this background.

Second, he must have a thorough knowledge of his national posture in economic coercion, both in offense and defense, with the national and international law bearing upon it. An understanding of his national posture requires understanding of the economic coercive postures of the principal adversaries of his state. Community characterizations of naval action will turn primarily upon the consequences of the action; and these consequences are predictable only when the broader context of action is grasped. A development of this broader context is attempted in Chapter II.

Assuming an adequate flow of intelligence to and from the naval officer concerned, the background elements mentioned permit conformity by the officer to past patterns of conduct to the extent current facts and his mission permit. The greater the degree of conformity to past conduct patterns held "legal" or "permissive" by relevant communities, the greater the likelihood these characterizations will be repeated.

It is impossible to duplicate fully these conduct patterns. Nor is conformity frequently desirable—especially when economic warfare is waged as a primary policy device.

The "economic sortie," an economic warfare technique recommended in this book for many applications, is a sharp departure from traditional economic warfare postures of major Western powers. These Western powers, furthermore, have been responsible for developing much of the international law applicable to economic warfare.

Thus, both the planner of an economic sortie and the officer charged with its execution must consider the extent to which the sortie differs from conventional economic warfare postures of his state. There is "legal" value in conformity and an element of jeopardy in nonconformity.

But if a departure from the norm is necessary in economic warfare, the emphasis shifts from the element of repetition of conduct

to secure favorable community characterizations to "legal strategy" or "legal management" to secure this favorable acceptance. How does a naval officer deal with these dynamic elements?

The Persistent Problem of Persuasion

In the moving factual framework in which he operates, a naval officer may have to persuade a formal policy maker to accept his action as "permissive" or "legal." More often he sets, or participates in setting, a factual matrix as a foundation for persuasive efforts by others.

Whether the naval officer persuades directly or prepares the foundation for persuasion by others, he will be aided in his tasks by developing insights concerning three matters. First, is ability to predict the level at which community characterizations of naval action probably will be made. Second, is understanding retrospective aspects of community characterizations and the difficulties stemming therefrom. Third, is appreciation of the "legal perspectives" of potential decision makers for relevant communities. What is the decision maker's understanding of "law"? Does he think "law" is made—and, if so, who is to make it?

Locating the Potential Decision Maker

By far the most important step in locating potential decision makers is anticipation by the planner or executor of conflicting demands the economic action probably will produce. If these demands normally will be asserted through the institutions of the state which the officer represents, no international decision makers are likely to be involved. General Butler in the "contraband" transaction carefully evaluated these interests and predicted correctly that no formal decision concerning his action would be rendered. Captain Wilkes failed to foresee that British claims concerning his interception of *Trent* would gain support in his own country and frustrate his reasonable purpose.

The instructions, if any, under which the officer operates provide a rough guide indicating the possible decision maker. When an officer acts without instructions, the community decisions may be made by institutions of his own state or by international organizations or by other states. Apart from predicting the interests affected, there is no way to forecast with assurance the community or communities for which decisions will be rendered. Both Butler and Wilkes acted without instructions. There was no community intervention in Butler's case. United States authorities intervened to restore the commissioners removed from *Trent* only after a complaint by England.

An officer acting pursuant to a broad grant of discretion is not

likely to be questioned by his national authorities. He has been invested by these authorities with a "legislative" function. However, the state for which he acts may be concerned with characterizations by international organizations or by other states. The officer also, although infrequently, may be required to answer before an international tribunal or before a tribunal of another state.

If the officer operates under precise instructions, his lawmaking function primarily is "adjudicative." His misconstruction or disobedience of these instructions renders him answerable to his official superiors. It is unlikely, on the other hand, he will be tried for misconstruing, obeying or disobeying these orders by an international tribunal or even the tribunal of an adversary.

Only a small percentage of the cases of officers acting in violation of international conventions or custom pursuant to superior orders were brought to trial before international or national tribunals after World War II. Apart from the fact that the burden of trial fell upon the officers of defeated enemy political establishments, a case was tried only when criminal participation by the officer seemed amply clear. Cases involving disobedience or negligence in executing orders were tried frequently by states of the officers concerned. Numerous less formal disciplinary measures were applied.

*Relevance of the Policy Level of the Decision
Maker to a Characterization of Economic Warfare*

The factual and legal perspective of the decision maker is affected by his policy level as is the time proximity of the decision to the economic warfare event. The element of time proximity in turn affects not only the process by which the decision is made, but also the factual and legal perspective of the decision maker.

Suppose, for example, it became necessary in the judgment of a destroyer commander, permitting no delay for instructions, to destroy an adversary submarine in a zone of interdiction such as that established in the Cuban Quarantine of 1962. The question immediately arises: what community or communities will make critical decisions of "legality" or "illegality" (or "permissiveness" or "impermissiveness" of the action)?

The importance of this conflict, whether the officer had broad discretion or operated subject to precise instructions, will require decisions within the naval command structure and at other levels within the Federal Executive Branch. The matter might come before Congressional Committees. Although a domestic judicial decision is unlikely, the case might be heard before a Naval Board of Inquiry or Court-Martial.

But these will not be the only decision-making levels at which the

action is characterized. The broad spectrum of interests involved will certainly elicit decisions by global and regional security organizations. The United Nations Security Council would have the case placed before it by the adversary state. Jurisdiction by the International Court of Justice might be invoked. *Ad hoc* institutions created by nonaligned states might characterize the transaction and be able to implement the decision in various ways. The adversary state might capture the officer or his vessel and conduct judicial proceedings.

Assuming decisions are made within the "state-community," within the naval command structure for example, the immediate issue which determines the bounds of inquiry will probably be the "reasonableness" of the officer's judgment concerning the necessity of defense of his vessel by the means adopted. But if the case is brought before the Security Council with the issue of international delinquency of the United States placed before it, the issue probably will be whether the force employed by the United States in the transaction in which the submarine was destroyed was proportionate to the threat posed by its adversary to its territorial integrity or political independence.⁴³

Before the Security Council, the reasonableness of decisions of many United States officials will be considered as these bear upon creation of the environment in which the naval clash occurred. Judgments may be rendered concerning the "necessity" and "proportionality" of the "Quarantine." The Council may consider the degree of effort by United States officials to find and analyze relevant facts before executing the Quarantine policy. The extent of their deference to international law as a coordinating scheme to minimize conflict with the adversary and the degree of their moderation in response to coercion may also be in issue.

The policy level thus tends to determine the "legal doctrine" applied as a standard of judgment. This doctrine tends to determine the scope of factual inquiry.

Decisions in the state of the officer who has taken the action are likely to be made in greater concomitance to the events. The element of retrospectivity in characterizing the act will have, for this reason,

⁴³ A state may resist by employing force proportionate to an imminent threat to its territorial integrity or political independence. E.g., Bowe, *Self Defense in International Law*, 8-27 (1958); Brownlie, *International Law and the Use of Force by States*, 251-79 (1963); McDougal & Feliciano, *Law and Minimum World Public Order*, 217-32 (1961). The decision to employ force must be *reasonable* under the circumstances attending the threat. Under the imperfect system of international police of coercive acts now prevailing, a *provisional* decision to use force may be made and executed consistently with the United Nations Charter when the necessity is clear to the state officials responsible for acting.

less effect than if the decision is delayed and rendered by a global or regional authority.

If broad discretion has been conferred upon the officer sinking the submarine, his primary lawmaking function is "legislative." His official superiors in his state-community may characterize his action as "lawful" or "permissive"; whereas decision makers representing a global community may identify the action of the officer with that of the state and characterize the action as "unlawful."

If the lawmaking function of the officer is primarily "adjudicative," the officer may encounter difficulty with his official superiors if he deviates too far from his instructions. Yet he may not have deviated so far as to be unable to plead superior orders either in defense or mitigation before an international tribunal.

*Retrospective Aspects of Community
Characterization of Economic Warfare*

An officer commanding a ship on blockade, when intercepting a vessel threatening a blockade breach, makes a decision based upon a retrospective consideration of facts. He isolates and temporarily crystallizes in his mind facts in a relationship imposed by his perspective. This perspective may be broadened or narrowed by predictions of probable future events and information concerning concomitant events developed by the officer or communicated to him by his intelligence service. But the process must be performed without delay for detailed study and deliberation. The decision is based upon a "segmented judgment of fact." It is, however, only one decision in a closely meshed series.

The factual context is dynamic. The officer involved is trained to make supplementary decisions in rapid succession. While each decision is based upon a "segmented judgment of fact," the rapid building of one decision upon another minimizes the factual obsolescence in each decision. Each decision is obsolete when made—but the effects of the decision are assessed with such rapidity and a new decision made with such promptness that a rational general direction of action is maintained.

Community characterizations of naval decisions share the common element of retrospection. But due to the typically greater time lag between the community characterization and the event in question than between decisions made by a naval officer conducting economic warfare, a community characterization tends to be distorted by factual obsolescence. Not only does the community decision tend to be "out-of-date" when rendered, but maintaining a rational policy orientation through successive decisions is difficult. This rational policy orientation is difficult because community decisions are ren-

dered by *uncoordinated* authorities (at national and international levels for example); with *differing* factual perspectives, stemming from the policy level of decision; and at *erratic* time intervals. Factual obsolescence accentuates the diversities in policy produced by the level of authority of the decision maker.

The process by which a community characterization is formulated is also affected by the time lag between the community decision and the events giving rise to it. In community decisions substantially contemporaneous with the events, which include most of the characterizations by national authorities and some international characterizations as well, the "segmented judgments of fact," stemming from the close scrutiny of economic warfare transactions permitted by modern communications, produce tendencies to prejudge the issues. Issues are defined and prejudgments made as the events unfold.

These tentative judgments are related by decision makers to the factual spectrum defined by their particular perspectives when an authoritative characterization of the events becomes necessary. However, this element of prejudgment (or bias), an element which Western legal cultures seek to exclude in domestic *judicial* processes, works in favor of rational characterizations of economic warfare.

The decision makers share the experience and understand the problems of planners and executors of economic warfare policies. The "judge" can put himself in the position of the actor when judging his action. If the judge and the judged share this common skein of experience, prediction of the probable community characterization becomes simpler on the part of the naval policy maker or executor and the groundwork for persuasion of the decision maker can be laid accordingly. Most of the community decisions with which a naval officer will be concerned are those generally contemporaneous with the economic warfare events.

But suppose the important community decision in the particular context is not one substantially contemporaneous with the economic warfare events. The greater the time lag between the economic warfare events and the community characterization, the more detached personally from the events the decision maker is likely to be. The process of "segmented judgments of fact" decreases in importance as an element of the ultimate decision as the personal knowledge of the events by the decision maker diminishes, his perspective broadens and his factual horizon recedes.

Disassociation of the judge from the events reduces bias. But this disassociation also makes it difficult to apply standards of judgment involving *subjective* features. The judge can no longer put himself in the position of the actor.

In "delayed" retrospective decisions, the tendency has been to

develop standards in which *objective* features dominate. For example, disputes concerning claims to territory or natural resources are often submitted for adjudication long after the disputes arise. The standard for decision stresses manifestations of effective control over the territory and resources. These are objective features. The "reasonableness" of the claims or the "intent" with which the claims were asserted involve subjective features not subject when much time has passed, to effective exploration. Personal contact of judges and witnesses with the events will be remote. Recollections will have faded.

International legal doctrines typically invoked soon after the events, such as "rights of self-defense," tend to take into account the perspectives and performances of the actors to a greater degree than do doctrines typically invoked long after the events have transpired. In retrospective decisions of later vintage, the inquiry will be directed towards objective factors. The question will then be framed in terms of "intervention," "aggression," "unneutral acts" or similar high order abstractions. An effort will be made to pour meaning into the terms by relating them objectively to verifiable events.

An exception to this general pattern of delayed decision making has been the handling of individual responsibility for criminal acts in international law. Typical have been cases involving war crimes and crimes against humanity. In many of these, "superior orders" have been offered by the accused either in defense or in mitigation of punishment.

When "superior orders" were urged in defense or mitigation of punishment, the accused was expected to show he had acted "reasonably" in relying upon and obeying the order. The tribunal passed upon this subjective element of the defense.

Some orders were held by the tribunals to be *prima facie* illegal—seemingly upon the theory any reasonable man ought to sense the element of illegality.⁴⁴ There was also a judgment of "reasonableness" in passing upon the response of the accused to an illegal order. The accused was expected to have made a reasonable determination of the probable force to be used against him if he disobeyed.⁴⁵ When an illegal order was issued as a reprisal, the accused was expected to make a reasonable judgment of the necessity and proportionality of the act ordered.⁴⁶

⁴⁴ See *Trial of Wielen*, 11 *War Crimes Reports*, 31, 46-47 (1947); *Trial of Renoth*, 11 *War Crimes Reports*, 76, 78 (1946).

⁴⁵ See *Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression*. Supp. B at 53-54 (1948); *The German High Command Trial*, 12 *War Crimes Reports*, 1, 72 (1948).

⁴⁶ See *Trial of Von Falkenhorst*, 11 *War Crimes Reports*, 18 (1946).

Rational decisions were rendered by applying a "reasonableness" standard in war crimes and related cases conducted during World War II hostilities or within a few years thereafter. Many of the judges and prosecutors were military personnel. They had served under the same pressures described by the accused in defense or mitigation of punishment.

But as time passed, "reasonableness" continued as a standard for judgment. Advantages were produced by the delay. The element of bias or prejudgment probably diminished. Emotion which charged earlier trials had dissipated. The loss of evidence by reason of the time lag was more than compensated by evidence which could not have been produced had the case been tried during or soon after the war. Yet the impracticality of the "reasonableness" standard as a guide for judgments rendered long after the events led to the surreptitious introduction of standards of simple political expediency when the case was decided.⁴⁷ These standards of political expediency obviously cannot be forecast when economic warfare is conducted.

When a naval officer conducts economic warfare, the *defensive* aspects of his legal strategy, directed to contemporaneous community characterizations of his action or to remote characterization potentially involving *objective* standards, should emphasize his control over the *factual matrix* upon which the decisions will tend to rest.

This control by the officer over the factual matrix quite obviously will not be complete. Decisions other than his own may appear relevant in retrospect. Of many of these he may be unaware when he acts.

This tendency of the facts to escape his control will be compensated, however, by the "segmented" factual process by which contemporaneous judgments are based and by the latitude for shifting the perspective (factual and legal) of the community decision maker afforded by his persuasive ability and that of legally trained professionals who assist him.

Control over the factual matrix becomes of decreased importance in relation to delayed decisions in which subjective standards for judgment purportedly are applied. As pointed out, the decision maker may diverge from the standard stated and apply unpredictable standards which are not articulated. The stated basis for judgment, for example, may be the unreasonableness of reliance by the officer upon a superior order. But the actual basis may be a judgment that it is inexpedient in the general community to permit a state to concentrate in a single person the powers the officer was authorized to

⁴⁷ See Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil* (1963) *passim* for an exploration of these problems in the highly publicized Eichmann trial.

exercise. The officer may be penalized as a symbol of the delinquency of his state-community.

In the defensive aspects of legal strategy, viewed from the level of the naval executor, judgments about the legal perspectives of potential community authorities who may characterize the action are important elements in planning and executing economic warfare. The importance is greater in relation to *delayed* characterizations involving *subjective* standards than in characterizations of other types.

Perspectives About Law and Lawmaking

In a delayed decision involving *subjective* standards, the outcome might turn upon the predisposition of the decision maker concerning *how* power should be allocated in the community he represents. As applied to the extensive administrative "lawmaking" functions involved in planning and executing economic warfare, the decision might rest upon *how much* law the decision maker thought had been made and *who*, in his community, he thought should make it.

A person recognizing elements of change in legal institutions and in the primacy of values sought through these will recognize the role of persuasion and the concept of management in dealing with problems possibly amenable to solution by legal devices. A person visualizing legal *principles*, bearing upon means and ends, as *static* elements, will deny law is managed or that persuasion is a dominant element in the process of making a decision in a legal context. Authorities holding both views, and expressing various shades of opinion related to these views, will make critical community characterizations of economic warfare.

The problem of persuasion thus involves convincing a decision maker that: (1) legal institutions and the primacy of values sought through these can and do change; (2) these changes can be initiated on an administrative level; and (3) the changes so initiated are compatible with the value preferences of the community whose authority passes upon the economic action.

The three basic perspectives about law and lawmaking with which a legal strategist in economic warfare may have to deal may be described for present purposes as "paleofundamentalist," "neofundamentalist" and "behavioristic." The first two perspectives have been and are still closely allied with religious tenets. There has been much feeding of ideas back and forth between legal and religious systems. Behavioristic perspectives are based upon methods developed largely during the late 19th and 20th centuries for the study of human relations. Psychological and sociological materials are stressed and much value is placed in methodology. Currently, either paleofundamentalistic or neofundamentalist legal perspectives are those most

likely to be encountered among community decision makers, although behavioristic schools are attracting increasing numbers of adherents.

Paleofundamentalist legal concepts are usually shared either by persons charged directly with the execution of laws or by those persons against whom laws are executed but who have little or no part in their formulation. Military and police officers, as specialists in violence, share this perspective as do laymen who have no experience in lawmaking either directly or by electing and scrutinizing lawmakers.

A military officer, for example, is steeped in an authoritarian tradition. He relies extensively upon military regulations to define his relationships with his superiors and subordinates. When he executes his orders, he expects to rely upon law which is stated and certain. As he sees it, this law is a scheme necessarily developed in the past. When he issues orders to his subordinates, he depends upon a concise and clearly articulated framework of law within which these orders are to be executed. He depersonalizes his exercises of authority by relying upon his position formally established within a legal system.

The paleofundamentalist regards a legal system as an arsenal of approved solutions. These solutions can be discovered by a lawyer or layman. When a solution so discovered is presented to an appropriate official, this official then applies the solution to resolve the conflict which stimulated legal action. Lawmaking is envisaged as done in the past by persons in positions of authority who drew their ideas from a superior system of logic or from divine inspiration.

By emphasis upon past legal doctrine as "law" and upon past acts as "lawmaking," the perspective of the paleofundamentalist tends to turn him towards action through legal institutions only when current controversies bear a close analogy to the factual conditions of past statements of legal policy. His tendency to invoke legal processes thus is reduced as factual analogies become difficult to make. As the ambit of law, as he sees it, is thus limited through his inability to draw factual analogies, he tends to shift radically to *ad hoc* legislative improvisations or to rely upon nonlegal techniques in executing policies.

Demands for highly organized and coordinated action and a high degree of predictability of response to action are forces which attract adherents to the paleofundamentalist position. But these demands are never satisfied because radical or revolutionary lawmaking efforts or recourse to nonlegal techniques for distributing or redistributing values tend to breed the disorganization of action and unpredictability in response to action which the paleofundamentalist seeks to avoid. Furthermore, the tendency by the paleofundamentalist to invoke legal processes only when factual analogies to past doctrinal

conditions are clear, means that legal processes are often used when unnecessary.

Recourse to *ad hoc* legislation when dealing with a specific conflict tends to produce either a *narrow* statute which quickly becomes obsolete and is easily evaded or a *general* statute immaturely considered because aimed at a single case. Establishing patterns of special treatment by *ad hoc* methods stimulates special demands conducive to disorganization because subgroups, often seeking values incompatible to those of the major group, may be organized to support these demands. General laws aimed at particular cases engender unpredictability in *official* action and complicate the task of law enforcement.

The *coup d'etat*, an extreme manifestation of the tendency by the paleofundamentalist to *ad hoc* lawmaking activity, does not stem in most cases from military disrespect for regular legal processes for change but from presentations of new facts making analogies difficult to conditions stated in constitutions, statutes or court decisions.

The tendency of the paleofundamentalist to rely upon nonlegal techniques, extending from moral or ethical pressures to mental and physical coercion, blurs the standards applied in executing policies and increases resistance to them.

Formulations of moral and ethical requirements tend to be personalized and provisional as contrasted with the generality and conclusiveness associated with "legal" prescriptions for conduct. Moral and ethical processes are useful in supporting "legal" processes in executing policies or in predicting or analyzing responses to these policies. But exclusive reliance upon moral or ethical standards weakens identification of the policy target with the policy maker. Hostilities of the target also are projected against the informal group sharing the moral or ethical standards. These groups may lack the effective authoritarian symbols to dispel this hostility. A formally organized community usually possesses the symbols to retain the loyalty of its members despite their discontent with "legal" prescriptions. Coercive pressures beyond the rubric of "law" to require adherence to alleged moral or ethical norms, intensifies resistance by the policy target.

When the paleofundamentalist repeats his use of legal processes in fact situations closely analogous to fact situations stated in legal doctrine, he may invoke law in many instances in which these conflicts are being resolved by nonlegal devices. This makes his use of law superfluous. This phenomenon is often encountered in activity requiring a high degree of coordination.

For example, a past statement of legal policy, rigorously and generally enforced, acts as an institutional bellwether. Courses of activity may be set by the policy in a direction justifiable by some obvious

requirement of coordination or cooperation. Thus, hand or electrical signals required by state statutes to be made by drivers before turning automobiles would continue to be made by most motorists even though statutes requiring these signals were repealed. The requirement that notice be given of the imposition of a blockade *jure belli* is superfluous because no modern blockade can be efficiently maintained unless mass communications are utilized to the fullest extent practicable to give notice to vessels which might enter the blockaded area.

Neofundamentalists, including within their number most of the legal profession, emphasize doctrinal aspects of law but believe principles of action can be found in these past policy expressions by which current policies can be guided. Neofundamentalism is a conscious or unconscious acceptance of central tenets of the 19th century "Historical School" that solutions to present problems and forecasts of future directions of growth stem from principles discoverable in human experience. Marx's theory of economic determinism, Maine's social theory of history derived from the experience of oriental village communities, and Admiral Mahan's search for principles of sea power affecting history are outgrowths of this dominant 19th century mode of thought.

As Admiral Mahan put the matter: ⁴⁸

* * * It is not * * * a vain expectation, as many think, to look for useful lessons in the history of sailing ships as well as that of galleys. Both have their points of resemblance to the modern ship; both also have their points of essential difference, which makes it impossible to cite their experience or modes of action as tactical *precedents* to be followed. But a precedent is different from and less valuable than a principle. The former may be originally faulty, or may cease to apply through change of circumstances; the latter has its root in the essential nature of things, and, however various its applications as conditions change, remains a standard to which action must conform to attain success. War has such principles; their existence is detected by the study of the past, which reveals them in successes and in failures, the same from age to age. Conditions and weapons change; but to cope with one or successfully wield the others, respect must be had to those constant teachings of history in the tactics of the battlefield, or in those wider operations of war which are comprised under the name strategy. * * *

The *legal* neofundamentalist, while perceiving law as a matter of management in accordance with principle, labors under the insur-

⁴⁸ Mahan, *The Influence of Sea Power Upon History, 1660-1783*, 7 (25th Ed., 1917).

mountable disadvantage of lack of documentation and proof of the history upon which he relies as a source. There is no dearth of law books, but these books concentrate upon statements of principle. If the neofundamentalist seeks to go behind these statements to verify them, he finds himself in intellectual quicksand—and the further he probes the deeper he sinks.⁴⁹

If he relies upon political history, he must consider the factual sifting by biased reporters, intentional misstatements for political purposes, and unconscious deficiencies in contemporary powers of observation of the facts and their relationships.

If he looks to reports of judicial decisions, he must take it for granted all the facts were not reported. Some facts were never introduced in evidence, some seemed irrelevant to the judge who decided the case, and others seemed unnecessary to the reporter.

If he looks to statutes, often he will find no facts unless he can find records of committee hearings or relevant contemporary political histories—all subject to the limitations previously mentioned. If application of the principle cannot be verified in the past, the neofundamentalist deals with history that is partially or wholly hypothetical.

The neofundamentalist, although he seeks principles for action, finds he must substitute for the assurance he deals with principles actually related to past fact, faith in the wisdom of the court or legislature formulating the principle and respect for the organ of authority by which the principle was propounded. To this extent, he is in much the position of the *paleofundamentalist*. However, the neofundamentalist views principles as developing from a recurring flux in human relationships (religious, economic or military, for example), relationships which are discerned and given authoritative expression as principles of action. This means that, unlike the paleofundamentalist, the neofundamentalist will invoke legal processes in preference to nonlegal modes of executing policies or to sweeping legislative or constitutional changes by constitutional or unconstitutional methods.

Adherents to the “Behavioristic Schools” reject the postulate of the neofundamentalist that principles of legal growth can be found in history. The behaviorist considers history a mass of myth and miranda which will confuse rather than clarify the current administration of law. The behaviorist emphasizes, instead, techniques by which the mind of a decision maker can be opened to the relevance and interrelationship of contemporary events. He does not reject entirely the value of historical experience, since he uses this experi-

⁴⁹ See Nevins, *The Gateway to History* (1963) *passim* for an exploration of some of these problems from the perspective of a professional historian.

ence to establish relationships between values; between values and the institutions and resources by which values are sought; and the impact of time, space and physical change upon these events.

The behaviorist draws consciously upon data currently developed in the physical and social sciences and puts this material to use in his methodology and in his policy recommendations. "Idealistic behaviorists" select, define and advocate the policy primacy of values in a value system and advocate policies for maximum access to these values by members of the communities with which the particular behaviorist identifies.

The task of the legal strategist in economic warfare would be simplified if every decision maker thought about "law" in the same way. Patently, this is not the situation.

In persuading the paleofundamentalist, much emphasis must rest upon control by the naval officer over the factual matrix of the conflict. Conformity in order to permit ready factual analogies will be valuable.

When conformity to past practices cannot be maintained, the paleofundamentalist may question whether a naval officer engaged in economic warfare should function as an effective lawmaker. His position probably will be that law should be *made* both formally *and* effectively at high policy levels.

This predisposition about lawmaking is difficult to *controvert*. It can be *accommodated* if the paleofundamentalist is kept in close contact with the evolving facts, his decisional process of segmented judgment of fact thus bringing him in close contact with the perspective of the naval executor in economic warfare.

The paleofundamentalist can be convinced without difficulty that much existing legal doctrine is obsolete. He may be persuaded for example, that statutes and treaties tend to be creatures of compromise and may be, in a particular situation, only "legal shells" or "exhausted elements of maneuver" between former competing interest groups within a relevant community.

The difficulty is that while the paleofundamentalist can be convinced that specific legal policies are obsolete—there being no probable factual analogy currently to that stated in a legal doctrine—his tendency then may be to shift either to nonlegal techniques or to seek some radical form of legal revision. The first may result in oversight of important legal elements in economic warfare described in this Chapter—relevant both in economic offense and defense. The second may take more time than can be tolerated in executing economic warfare.

The approach to the paleofundamentalist should thus emphasize conformity to past practice, obsolescence of the applicable legal doc-

trine and minimum legal change by the naval executor in executing economic warfare policy. The breadth or narrowness of the administrative instructions under which the officer acts will certainly bear upon a decision by the paleofundamentalist, the latter insisting upon strict adherence to specific instructions but tolerating major divergences when instructions are broad.

A neofundamentalist will accept the role of a naval administrative maker of law but will be less receptive to arguments that legal doctrines are obsolete. The neofundamentalist finds enduring statements of *principle* in legal doctrine. A naval administrator will be expected to operate within the confines of a legal *system* in the interest of the coordination, balance and direction such a system may provide.

Persuasion of the neofundamentalist does not turn principally upon control of the factual matrix by the naval executor of economic warfare. Critical, instead, is skill of the naval executor or skill by others in defining within the naval transaction principles of action consistent with the values the relevant community is organized to seek. Analysis rather than control of facts is vital.

Behaviorists will recognize the lawmaking role of a naval officer without difficulty. Attention to legal doctrine by these decision makers will be directed primarily to doctrinal impact upon predispositions to action. Their methodology, permitting an accurate identification of values within a community, the primacy of these values and the institutions by which these values are sought, affords a basis for predicting their decisions. Yet the great weight placed by the behaviorist upon the influence of his decision upon contemporary and future trends, with his intensive development of physical and social science resources as decisional aids, also diminishes predictability. The behaviorist, nevertheless, is amenable to arguments based upon the actual impact of the economic warfare policy and its continuing compatability with community values.

CHAPTER II

LEGAL STRATEGY IN DEFENSIVE ECONOMIC WARFARE

THE SUGAR ENCOUNTER

INTRODUCTION

The "Sugar Encounter" between the United States and Castro Cuba was a step in a progression of events leading to naval participation in such transactions as the Cuban Quarantine of 1962 and the Cuban land blockade of the Guantanamo Naval Base. As with most forms of economic warfare, the "Sugar Encounter" evolved towards mutual political postures in which naval sea and air power became logical instruments of coercive economic policy.

But apart from this demonstration from subsequent events of the need for an understanding by naval participants in economic warfare of prior economic warfare postures, the "Sugar Encounter" demonstrated dramatically, if not for the first time, the economic warfare potential of the Soviet and Sino Communist Blocs, acting singly or in unison, and the kinds of defensive legal problems the United States would have to solve to meet this emerging economic warfare threat.

In the "Sugar Encounter," the United States attempted to meet an "economic sortie" mounted by Castro Cuba by manipulating the Cuban sugar imports permitted into the United States and by supplementary measures in the form of "protracted harassment." This Cuban economic sortie was mounted to divide opinion in the United States and prevent decisive action as communization of the Cuban state became increasingly apparent.

As a delaying tactic, this economic sortie was effective. The United States defensive measures proved comparatively fruitless.

The description of the evolution of this defensive sugar policy in this Chapter serves to develop three features without which contemporary international law concerning economic warfare and legal strategy as a feature of economic warfare policy cannot be fully understood.

The first feature is the posture of the monolithic state trader,

particularly the Communist monolithic state trader, and the impact of this economic institution upon economic warfare and upon international law.

The second feature is the national law of the United States bearing upon economic warfare and the major problems in its administration. No international legal problems concerning economic warfare can be fully understood by naval officers unless relevant national law is first appreciated.

The third feature is the continuing chain of economic coercion and the ways in which this chain is affected by community intervention. The Chapter thus considers not only the "Sugar Encounter" as such, but also major economic measures put into operation upon initial failure of the United States defensive manipulation of the sugar quota. The interests affected by this complicated process were varied, and a naval officer in conducting economic warfare must become accustomed to identifying interests affected by his action and how the parties interested are likely to respond.

The materials in the Chapter are essentially descriptive. They provide the basis for a detailed analysis of both national and international legal problems in Part II of this book.

A. THE MONOLITHIC STATE TRADER IN ECONOMIC WARFARE

Within the past fifty years there has been an increased emphasis upon elements of timing and speed in executing economic warfare plans and a similar increased emphasis upon the need for accurate aim and careful direction of offensive economic action. If offensive economic action is aimed accurately, directed carefully, executed decisively and swiftly, and terminated when the desired psychical effect is achieved, by-products of possible disadvantage to the sponsoring state are likely to be avoided. The increased emphasis upon these elements results partly from the presence of the monolithic state trader in commercial channels.

1. Competitive Advantages and Disadvantages of the Monolithic State Trader in Economic Warfare

The foreign trade of the Soviet Union was one of the first private enterprises nationalized after the Revolution of 1917. The internal economy of the Soviet Union is now centrally and rigidly controlled. Its controlled economy has been substantially duplicated in the satellites, and by Red China; and while the efficiencies of the Bloc systems, the details of their organization, and the capacities

of the various Bloc states to engage in economic warfare differ, the advantages and disadvantages of the monolithic state-trading system are the same for all Bloc states.

Centralized control of domestic processes for distributing consumer goods tends to instill "use discipline" in the population. A low standard of living is either unwittingly accepted or grudgingly tolerated. Supplies required for domestic consumption are thus low and limited in variety. Imports are less, depending upon the efficiency of the local productive processes, than they would be if there was no "use discipline" or a higher standard of living.

"Surpluses" can be generated to be marketed or donated abroad to support foreign policies. The Soviet Union, for example, despite the agricultural dislocation of World War II, could export 400,000 tons of wheat to France in 1946.

Manufactured goods available for export are likely to be for industrial rather than for consumer use. This tends to concentrate Bloc markets in areas with a low consumer demand. Bloc products cannot compete effectively with Free World consumer goods in higher consumer demand areas. To the extent consumer demand can be stimulated in low demand areas, local resources channeled into Bloc trade can be progressively restricted.

Labor unrest, actual or potential, is a source of weakness even in a heavily policed Bloc community. Bloc populations, already on a low standard of living, are especially sensitive to disturbances in their food supply, either by interfering with their agricultural production or by blocking imports of food.

As there are no major private entrepreneurs to protect, tariffs, quotas and exchange controls to limit the flow of imports are unnecessary, and this places the State Trader in a desirable bargaining position with "free-enterprise" states. A Bloc state may import foreign products in excess of local needs simply to develop a foreign market for future political leverage. Purchases, clearly in excess of Soviet or satellite needs, have been made of cocoa from Ghana, cotton from Egypt and the Sudan and rubber from Ceylon.

The absence of a "profit concept" in the "free-enterprise" sense also has advantages for the Bloc state. While the quality of industrial goods has been low in many instances, prices and credit terms offered, together with opportunities for barter, have tempted countries with low reserves of convertible foreign exchange. Italian firms selling chemicals and synthetic fibers to the Soviet Union have accepted oil, cotton and coal in payment. To the extent that Bloc trade presents a competitive threat in a Free World country,

it is difficult to deal with Bloc competition with laws keyed to profit concepts. In the words of Samuel Pizar:¹

* * * Western antidumping laws * * * cannot adequately cope with the possibility of Communist dumping or underselling. For example, there is no effective way of determining the 'fair value' of Communist products under the present terms of our Antidumping Act as amended in 1958.² 'Foreign Market Value' is a useless criterion because there is no free home market in a Communist country. 'Constructed value' is equally useless because Communist cost of production is an outlandish notion which has no relation to normal Western cost accounting or pricing principles. * * *

Soviet Trade Control Structure

But by far the most important basis of competitive advantage in economic warfare of the Bloc state is the governmental structure of trade control. This stands as a barrier to economic attack by the traditional forms of "protracted" economic harassment and provides machinery for incisive economic warfare direction.

The foreign trade of the Soviet Union is coordinated by the Ministry of Foreign Trade. The Minister is a member of the Central Committee of the CPSU. Four geographic divisions within the Ministry, two concerned with Bloc and two concerned with non-Bloc countries, deal with trade on a country-by-country basis. Other divisions within the Ministry deal with particular types of goods and with particular functions, such as finance, law, transport and personnel.

Trading is done by 25 government owned corporations. Some specialize in trade in particular items. Others specialize in trade with particular areas. The corporate organizations differ depending upon the conditions under which they work. AMTORG, the corporation specializing in trade with the United States, is a New York commercial corporation, owned by the Bank for Foreign Trade in Moscow.

The Ministry of Foreign Trade is represented abroad by trade delegations. The members of these, unlike the officers of the corporations, such as AMTORG, belong to the embassy staff and enjoy diplomatic immunity. The trade delegations collect economic intel-

¹ Pizar, *A New Look at Trade Policy Towards the Communist Bloc*. (Material prepared for the Subcommittee on Foreign Economic Policy of the Joint Economic Committee, U.S. Congress, Doc. 76695, 1961) 24-25.

² Antidumping Act of 1921, 42 Stat. 11 (1921), 68 Stat. 1138 (1954), 72 Stat. 583 (1958), 19 U.S. Code 160 *et seq.*

ligence and serve as agents for those trading corporations which are not domesticated in the country with which business is to be done.

If the country concerned does not have diplomatic relations with the Soviet Union, the functions of the trade delegation may be performed by a special group. This may be headed by the Minister of Foreign Trade if the political importance of the mission justifies his participation.

Paralleling in some respects the functions of the Ministry of Foreign Trade is a state committee, GKES. This committee plans foreign economic operations and supervises execution of these plans. The Ministry of Foreign Trade, by contrast, is charged principally with negotiation and completion of trade agreements.

Although little has been published concerning the control and operations of GKES, the committee appears to provide the political direction of trade of the Soviet Union and to coordinate Soviet trade and Soviet aid. It has the characteristics of a highly placed economic warfare staff. Technicians installing an industrial plant or furnishing advice as to its operation in an underdeveloped country—in short, the persons who would be channels for Soviet political influence—are controlled by GKES rather than by the Ministry.

Economic activity of the satellites is coordinated by GKES through the Council for Mutual Economic Assistance (CEMA). CEMA is concerned primarily with intra-Bloc trade but deals also with foreign trade of the satellites. It is a consultative committee with a permanent conference of deputies, who meet weekly in Moscow, a secretariat and a policy body made up of chairmen of the state planning commissions within the respective satellites. Permanent working committees maintain liaison with the state planning committees. CEMA provides a point at which marketing information can be exchanged and satellite programs can be developed to support Soviet political strategies.

The defensive capabilities of this system are impressive. Trade conditions, like military and political plans, are a state secret. A private corporation of a Free World state, a convenient institution for economic action in the past, must do its business in the Bloc state through a government agency. It has no direct contact with its market.

Commercial contracts are “canned.” The contracts contain provisions which are nonnegotiable and which must be accepted by the Free World corporation in order to do business. For example, most of the Soviet contracts stipulate for arbitration of disputes arising concerning their terms before the Moscow Arbitration Court. The inconvenience to the Soviet trading corporation of litigation in the

state in which the private corporation is domiciled is thus substantially avoided. There is a remote chance, of course, that the dispute might be brought before an international tribunal.³

The offensive capabilities of the Bloc state trader are as imposing as its capabilities for defense. The highly centralized trade and aid organization probes unremittingly for points of legal weakness.

The Bloc trading policy is basically divisive. Bilateral trade agreements are attempted, specialized to the country with which the agreement is negotiated. Multilateral trade agreements, which might provide a foundation upon which Free World states could confront the Bloc on a common basis, are avoided.

Bloc trade activity can thus be conducted flexibly and opportunistically without the legal impediments which many Western states have accepted in order to obtain reciprocal trade concessions. In writing of the difficulty in regulating trade relations with Communist countries, Mr. Pisar states:⁴

The steady proliferation of bilateral agreements and barter arrangements constitute an increasing obstacle to the assimilation of Communist trade into the multi-lateral framework of world commerce. Existing arrangements such as GATT, the International Monetary Fund, various trade associations and commodity exchanges, as well as more specialized international conventions (e.g., arbitration, patents, copyright), cannot in general be expected to cope with the peculiar phenomenon of Communist trade. Either Communist countries refuse to adhere to such established 'gentlemen's agreements' or, if they do adhere, their obligations assume a distorted meaning in the context of a state-operated market.

A Soviet trading corporation can contact its buyers directly in Free World states. It can circulate catalogs, stimulate demands, take advantage of local patents and glean much economic intelligence.

Soviet Bloc Economic Warfare Techniques

The Soviet Union began to implement its foreign policy by economic measures in 1923 as it recovered from the internal dislocation produced by revolution, famine and blockade. But no major

³ Recourse to adjudication will depend upon the willingness of both the state of domicile and the Soviet Union to participate. The corporation would have no special status to appear as a litigant and would have to be represented by its state of domicile or by some other state which might claim the right to extend its protection.

⁴ Pisar, *op cit.*, 26.

use of wealth as an offensive weapon was made until after the death of Stalin.

Having removed most of Eastern Europe and mainland China from the aegis of Western political and economic influence, it was Stalin's theory that denial of this market to the West would undermine the economies of Free World nations and stimulate an internecine struggle among them for fragments of the remaining market. Trade with the West remained at the minimum necessary to meet military and domestic requirements of the Soviet Bloc.

This "dual" or "parallel" markets theory was repudiated after the death of Stalin. Trade and aid have since been combined to form a cutting edge for the Soviet political wedge. Primacy is given to one or the other as the characteristics of the political target warrant. In almost every instance Bloc trade and aid have been skillfully controlled and coordinated.⁵

Bloc purchases in the West usually have been of raw materials, such as rubber and fats, processed items, such as oils, synthetic fibers, plastics and heavy chemicals; fabricated metals, such as plates and sheets, structural shapes and tubing; machinery, such as machine tools and electrical equipment; and major fabricated devices such as trawlers and locomotives. Interest has been demonstrated in purchasing entire plants with the technical information to operate them. These purchases often involve performances by two or more corporations, some furnishing design and machinery and others technical information and training necessary to operate the plant.

Bloc strategy, as developed in the late 1950's, combined conquest by economic accretion with the "economic sortie" as inviting points of weakness in Free World nations appeared. The trading pattern of the target area is gradually reoriented towards the Bloc by increasing purchases of its products. These purchases usually are

⁵ The most recent comprehensive studies of Soviet economic warfare are Allen, *Soviet Economic Warfare* (1960) and Allen, *Communist Economic Warfare* (1960) (Committee on Un-American Activities, H. R., 86th Cong., 2nd Sess. Doc. 51038). Also suggested are Aubrey, *Co-existence* (1961); Berliner, *Soviet Economic Aid* (1958); Benham, *Economic Aid to Underdeveloped Countries* (1961); Knorr, *Ruble Diplomacy* (1956); Kovner, *The Challenge of Coexistence* (1961); Mikesell and Wells, *The Soviet Economic Offensive* (1959); *The Threat of Soviet Economic Policy* (Department of State Publication 7234) (1961); and *Communist Economic Policy in the Less Developed Countries* (Department of State Publication 7020) (1960). Pizar, *A New Look at Trade Policy Toward the Communist Bloc* (Sub-committee on Foreign Economic Policy of the Joint Economic Committee, U.S. Congress, Doc. 76695, 1961) is a recent and useful reference, although Mr. Pizar's emphasis upon economic warfare is subordinate to broader considerations of trade policy.

in dollars or other convertible currency to provide the initial attraction.

The Free World markets of the target area are restricted at the same time by selling the purchased products at a low price to customers of the target. Egyptian cotton, for example, has been sold by satellites below the world market price.

As dependence upon Bloc trade in the target area increases, the Bloc offers long-term credits at low-interest rates and shifts trade to a barter basis. The use of credit probably stems from a desire to shift to barter rather than from a design to force the debtor into bankruptcy by insisting upon repayment at an awkward time. Yet the credit has coercive possibilities for future action by the Bloc.

The size of the credit and its usual earmarking for "impact" projects generates publicity and conspicuously labels the benefit, such as an industrial plant or dam, as a contribution of the Bloc. Administration of the credit provides an opportunity to establish working relationships with key officials and influential organizations.

As ties of the target area with the Free World are weakened, military assistance and grants in aid are commenced. Military assistance permits the introduction of large numbers of technicians, infiltration of the policy making and security institutions of the area, and neutralization or communization of influential governing groups.

Economic penetration by the Bloc commenced with the aid program to Afghanistan in 1954. The program was extended to India, the UAR, Indonesia, Iraq, Ethiopia and Guinea. Technicians were provided for service in these countries and natives, both civilian and military, were received in Bloc schools.

The Soviet Union, as of 1960, had extended credits or grants to Free World or "Uncommitted Countries" of approximately \$3.1 billion. The European satellites and Red China together had extended credits or grants of slightly over \$1.0 billion, the aid extended by Red China being substantially larger than that of any European satellite. Although the credits have not been utilized fully, twenty-five Free World or "Uncommitted Countries" have received economic assistance from the Bloc.

Bloc assistance may temporarily strengthen the economy of the country aided. This strength may become permanent. The Bloc program is too new to draw hard and fast conclusions about it. But the ultimate effects of Bloc aid and trade may be to disturb the political stability of the area.

Industrial plants and public works have been particularly favored as forms of Bloc aid. Public works, with health and education services, are usually the forms of assistance most needed by under-

developed states to lay the foundation for political stability. But premature industrialization of an underdeveloped state, lacking law and conduct patterns not readily geared to the problems of an industrialized society, may stimulate chaotic conditions in which Communist political doctrines and institutions can obtain a secure foothold. Such chaos, if it can be distinguished from the turbulence usually associated with the creation of a new state, cannot at this stage be said to have resulted from Bloc aid and trade. Nor has the economic orientation of any Free World or "Uncommitted Country," other than Cuba, been changed sufficiently to be used as a base for Soviet political control.

Soviet tugs on the reins of states thought to have been "enveloped" economically, such as Yugoslavia, Egypt and Albania, have not produced the effects one might reasonably expect. The present danger to the Free World is the divisive effect of Soviet Bloc economic warfare which stems from the high degree of flexibility and direction which Bloc economic policies have demonstrated.

Although the Bloc suffers from a disadvantageous disparity in material resources, and has significant weaknesses of its own, it has the advantage of ability to concentrate its economic power at points of weakness in the Free World. It also possesses organization which permits rapidity in decision and execution of policies. The Bloc is equipped to deliver economic sorties in addition to its slower technique of capture by economic accretion.

The economic organization of the "free-enterprise" Free World, in which the United States is the mobilizing force, is by contrast keyed to a defensive policy in economic warfare. The United States policy, furthermore, is one of defense by protracted harassment of the opponent rather than of counterattack by "economic sortie." As Secretary of State Rusk, with specific reference to security controls, testified: ⁶

* * * While our policy of control is a selective one and while we cannot expect to cripple Soviet Bloc economic or military power through an export control system, we can accomplish something useful if we recognize that our objective must be a limited one. That objective is to delay the development of Soviet military capability in selected areas where a coordinated denial policy by Western suppliers may have an impact. We

⁶ *Investigation and Study of the Administration, Operation, and Enforcement of the Export Control Act of 1949, and Related Acts.* (Hearings before Select Committee on Export Control, House of Representatives, U.S. Congress, Doc. 77836, 1962) 69.

cannot hope to erect an absolute barrier to Soviet advancements in military production; we can make it more difficult or more time consuming for the Soviets to make certain kinds of progress. From this standpoint, the trade control operation is closely akin to the basic objective of our national defense policies—namely, the preservation and if possible the widening of the margin of advantage in time wherever we enjoy it in military capability. It is this margin in ultimate military power which is the hope of the West in the near term, and whatever contribution the trade control system has made to its maintenance is valuable. * * *

2. The United States and the Free World: The Legal Response to Bloc Economic Warfare

The basic laws by which the flow of trade between the United States and foreign countries is controlled for political objectives are the Export Control Act of 1949⁷ and the Trading With the Enemy Act of 1917.⁸ The Mutual Defense Assistance Control Act of 1951 (Battle Act)⁹ establishes the basis for the United States relationship with the Free World system of voluntary controls over the export of strategic goods to the Soviet Bloc and relates this program of trade restriction to the foreign aid program of the United States. Other laws, such as the Johnson Act,¹⁰ prohibiting private loans to countries in default in payment of their obligations to the United States, have some political relevance but are of less importance in economic warfare.

Export Control Act of 1949

The Export Control Act of 1949 is administered by the Secretary of Commerce pursuant to authority delegated by the President. The Secretary of Commerce thus controls all exports except the following: Armaments, aircraft, special airborne equipment and

⁷ 63 Stat. 7 (1949) ; 50 U.S. Code App. 2021 *et. seq.* The act has been extended several times.

⁸ 40 Stat. 411 (1917) ; 50 U.S. Code App. 1 *et. seq.*

⁹ 65 Stat. 644 (1951).

¹⁰ 48 Stat. 574 (1934). Section 620(c) of the Foreign Assistance Act of 1961, 75 Stat. 424 (1961), prohibits assistance to the government of any country which is indebted to any United States citizen for goods or services furnished, when such citizen has exhausted available legal remedies and the debt is not denied or contested by such government.

helium, which are controlled by the Secretary of State;¹¹ atomic materials and facilities, controlled by the Atomic Energy Commission;¹² and narcotics¹³ and gold,¹⁴ controlled by the Treasury Department.

Pursuant to powers delegated by the President under Section 5(b) of the Trading With the Enemy Act of 1917, the Secretary of the Treasury controls shipments of strategic commodities by foreign subsidiaries of domestic corporations by the Foreign Assets Transaction Regulations¹⁵ and the Transaction Control Regulations.¹⁶ These regulations are enforced by action against the parent company in the United States.

In Section 2 of the Export Control Act of 1949, the Congress expressed its policy to use export controls:

* * * [T]o the extent necessary (a) to protect the domestic economy from the excessive drain of scarce materials and to reduce the inflationary impact of abnormal foreign demand;

¹¹ 68 Stat. 848 (1954), 72 Stat. 267 (1958); 22 U.S. Code 1934 *et seq.* The munitions list and licensing regulations appear in 22 CFR, Part 121 *et seq.* Imports as well as exports of munitions are controlled by the Department of State. Arms reduced to scrap, by being rendered useless beyond the possibility of restoration to their former identity, are licensable as scrap by the Department of Commerce. Manufacturers, importers and exporters of the articles on the munitions list are required to register with the Secretary of State. Intransit licenses as well as export and import licenses are required.

¹² 68 Stat. 936 (1954), 70 Stat. 1071 (1956), 72 Stat. 276 (1958); 42 U.S. Code 2034 *et seq.* The controls over transactions in atomic materials are more stringent than any other since these materials are handled by the Atomic Energy Commission in a manner which amounts to a state-trading monopoly.

The exports controlled by the Commission are (a) source material, of which substantially none has ever been exported to the Soviet Bloc, (b) by-product material of which small medicinal quantities have been licensed for export, (c) special nuclear material, such as plutonium, which can only be exported by the Commission and is not subject to licensing and (d) facilities for producing and utilizing special nuclear materials, such as gaseous diffusion plants.

Nuclear materials of a special character and production and utilization facilities may be transferred only to nations or organization with which the United States has agreements for cooperation under the Atomic Energy Act. There are no such agreements with the Soviet Bloc but there is such an agreement with the International Atomic Energy Agency to which Bloc countries belong. These countries could obtain these items through the Agency, in which case Agency controls would apply to assure that the items were used only for peaceful purposes. No such case has arisen, Bloc countries being unwilling to accept the controls required by the Agency.

¹³ 21 U.S. Code 171 *et seq.*; 26 U.S. Code 2590, 3230 *et seq.*

¹⁴ Gold Reserve Act of 1934, 48 Stat. 337 (1934), and 12 U.S. Code 95 a (section 5(b) of the Trading With the Enemy Act of 1917).

¹⁵ 31 CFR, Part 500.

¹⁶ 31 CFR, Part 505.

(b) to further the foreign policy of the United States and to aid in fulfilling its international responsibilities; and (c) to exercise the necessary vigilance over exports from the standpoint of their significance to national security.

The Export Control Act has been used to control all commodities and technical data exported to other countries except Canada; to impose selective controls upon products shipped to the Soviet Bloc; and to embargo all shipments to Red China, North Korea, North Vietnam and other Communist controlled areas in the Far East.

The Department maintains a "Positive List" of commodities and data considered critical to the military power of the Soviet Bloc. Validated licenses for listed items are required for each transaction. For items not on this list, general licenses are issued. General licenses authorize conditional export to specified destinations without the necessity of obtaining a special license for each export transaction.

The activities of the Department of Commerce in export control are coordinated with those of other departments and agencies through an Advisory Committee on Export Policy (ACEP). Membership is on the Assistant Secretary or Deputy Assistant Secretary level.

The Departments of Agriculture, Defense, Interior, State and Treasury, and the Federal Aviation Agency and National Aeronautical and Space Agency are represented. The Committee Chairman is the Assistant Secretary of Commerce for International Affairs.

Day-to-day coordination is provided by an Operating Committee with representatives from the Departments and Agencies participating in the Advisory Committee plus observers from the Atomic Energy Commission and Office of Economic Planning. The Chairman of the Operating Committee is the Director of the Export Policy Staff of the Office of the Director of the Bureau of International Programs in the Department of Commerce. The Operating Committee meets on call or the members may consult informally.

A third body, established by Executive Order, is the Export Control Review Board, consisting of the Secretaries of Commerce, State and Defense, with the first as Chairman. Policy matters are channeled through all three levels of decision.

These policy matters include such things as additions to or deletions from the "positive list" and control problems affecting particular countries or areas. A question of granting or denying a particular license might or might not involve a broad policy matter. A license, for example, would be considered in the Operating

Committee if a licensing officer was unable to determine readily from the positive list that it should be denied or granted. If all members of the Operating Committee concur, the matter ends there, although if the license is approved, it must go to the Secretary of Commerce for final approval. If a member of the Operating Committee dissents, the matter goes to the Advisory Committee on Export Policy (ACEP).

The same procedure is followed in the Advisory Committee. If a member of the Advisory Committee dissents, the matter is reviewed by the Export Control Review Board. Matters of great importance might be referred by the Board to the National Security Council or to the President. The Secretary of Commerce can make the final determination on the Export Control Review Board. In practice a unanimity rule has been followed.

The major sanction supporting the export licensing system is denial of an export license. This denial may be for a short period or for the duration of the Act. Notice and a hearing are required. Criminal sanctions are also provided but are difficult to apply because much of the evidence must come from foreign sources and is not readily obtainable. Customs officials can seize and condemn goods being exported or about to be exported in violation of the Act and a vessel carrying prohibited goods can be required to return to port and discharge unlicensed cargo.

Information required to enforce the Act is obtained from various sources, including United States Intelligence Agencies, Economic Defense Officers of the Foreign Service in posts overseas, and the F.B.I. The Department of Commerce also has its Commercial Intelligence Division.

Trading With the Enemy Act of 1917

The controls over exports applied pursuant to the Export Control Act of 1949 can also be developed under the Trading With the Enemy Act of 1917. This Act is intended principally as a basis for interdicting private communications between persons in the United States and an enemy or ally of an enemy during a war declared by the Congress. Section 5(b) of this Act, added in 1933, confers broad powers upon the President in time of peace as well.

To bring Section 5(b) into operation, the President must declare an emergency. A declaration of a national emergency was made by the President in 1950 and is still in force. The provisions of Section 5(b) thus continue to operate.

The powers conferred upon the President by Section 5(b) are:
(1) Investigate, regulate or prohibit any transaction in foreign

exchange, transfer of credit or payment between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities; and (2) Investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, any transaction involving any property in which any foreign country or national thereof has any interest.

The President has delegated his powers under this section to the Secretary of the Treasury. As previously noted, transactions in gold are controlled pursuant in part to these provisions.

Likewise foreign trade transactions in strategic commodities by foreign corporations effectively controlled by domestic corporations are subject to license under 5(b).¹⁷ Enforcement action is against the domestic corporation. The effective control may be through stock ownership or perhaps by patent licenses. Financial controls have been imposed pursuant to this Section to block assets of Red China, North Korea and their nationals in the United States and to impose controls upon imports originating from these countries.¹⁸

Exceptions can be made by Treasury licenses, but the boycott on Red Chinese and North Korean goods has been total. Section 5(b) of the Trading With the Enemy Act is thus like an accordion which can be stretched or compressed as required to block imports or exports and control financial transactions as determined by the President.

Battle Act

The Battle Act is administered by the Assistant Secretary of State for Economic Affairs. The purpose of this statute is to deny strategic commodities to the Soviet Bloc by bringing pressure upon countries receiving any form of United States aid to embargo these items. The Battle Act lists are revised from time to time to take account of economic and scientific progress within the Bloc. The latest revision was in 1960.

¹⁷ The restricted transactions are described in 31 CFR 505.10 as “* * * merchandise * * * included in the Positive List of Commodities set forth in 15 CFR Part 399 and * * * identified on that list by the letter “A” in the column headed ‘Commodity Lists’ or is of a type the unauthorized exportation of which from the United States is prohibited by any of the several regulations referred to in 15 CFR 370.4.” These descriptions include only items of major strategic importance. The Treasury restrictions change as the Positive List is modified.

¹⁸ Transactions are also controlled in property in which either Egypt or the Suez Canal Company has an interest. 31 CFR, Part 510.

The critical features of the Act are: (1) selective controls such as those used in the Export Control Act of 1949; (2) termination of assistance to countries which ship interdicted items to the Bloc, (a) on a mandatory basis if the shipment is on Battle Act List "A," armaments, atomic materials, etc., and (b) on a discretionary basis if the shipment is of materials on Battle Act List "B," the President having authority not to terminate if he finds unusual circumstances indicating that curtailment of aid would be detrimental to the security of the United States; and (3) creation of an administrative center to coordinate the controls of the United States with those of the remainder of the Free World. There have been no terminations of aid under the Battle Act, no items on List "A" having been shipped and the President having found unusual circumstances in shipments of items on List "B."

Although the Act, no doubt, has deterred some Free World shipments of strategic goods to the Soviet Bloc, its important effect has been the development of a coordinating center, the Economic Defense Advisory Committee (EDAC), paralleling in some respects the Advisory Committee on Export Policy (ACEP) which functions in the administration of the Export Control Act of 1949. However, there is no special review board above EDAC.

The Assistant Secretary of State for Economic Affairs, Administrator of the Battle Act, serves as Chairman of EDAC. The Committee contains representatives of the Departments of Defense, Commerce and Treasury, the Atomic Energy Commission and Central Intelligence Agency, and other departments or agencies interested in particular questions subject to consideration.

There is a subsidiary executive committee, dealing with questions not requiring resolution by EDAC as a whole, and two working groups. The first deals with international export control systems, and the second deals with enforcement and transshipment questions having an international aspect.

EDAC is used to reach interdepartmental and agency agreement concerning instructions to field representatives dealing with the international control system for strategic materials and to obtain advice on Battle Act questions. For example, questions concerning the licensing of transactions in strategic materials by foreign corporations effectively controlled by domestic corporations are referred by the Treasury Department to EDAC for recommendation.

International Control Structure for Strategic Trade

The international control structure with which EDAC maintains liaison existed before passage of the Battle Act. This is the

Consultative Group (CG), an informal voluntary organization of fifteen Free World states, including the United States.¹⁹

The Group has operating under it a permanent working committee, described as the Coordinating Committee (COCOM) when it deals with exports to the Soviet Union and the European satellites and CHINCOM when it deals with exports to Red China, North Korea and North Vietnam. The unanimity rule applied to all but procedural questions and the obligations of the fifteen participating states are moral only.

Until 1957 a differential existed between embargoed items to the European Soviet Bloc and embargoed items to Red China. This was abandoned because of pressure by a number of Consultative Group members.²⁰

There are currently two International Lists (IL). List I contains embargoed items. List IV is a "Watch" list of items which are maintained under surveillance. Lists II and III (quantitative and surveillance control items) were abolished in 1959.

A number of supplementary controls are used. By the Import Certificate-Delivery Verification System (IC/DV) a Consultative Group state, before granting a license to export a controlled item, requires the exporting firm to present an import certificate, executed by the importing firm and certified by the state of destination. The certificate states that the shipment is actually destined for the state indicated and will not be diverted or reexported. The exporting country may also obtain a certificate of delivery verification in which the importing state certifies that the goods were actually delivered to the destination licensed.

Many of the Consultative Group states also require Transit Authorization Certificates (TAC) for goods originating in member states and on the embargo list passing through the territory of another member en route to the Soviet Bloc. The TAC is issued by

¹⁹ Belgium, Canada, Denmark, Federal Republic of Germany, France, Greece, Italy, Japan, Luxembourg, Norway, Portugal, The Netherlands, Turkey, United Kingdom, United States. The system began with an Anglo-French list established in 1949. Each cooperating country has its own national control list. All the NATO signatories except Iceland belong to the Consultative Group.

²⁰ On May 18, 1951, the General Assembly of the United Nations recommended that every state apply an embargo on shipments to Red Chinese and North Korean areas of "arms, ammunition and implements of war, atomic energy materials, petroleum," transportation resources, and items useful in arms production. At one time a strategic embargo on these items was applied by 45 states, but after the Korean Armistice in 1953 the restrictions were rapidly jettisoned. CHINCOM was formed within the Consultative Group during this period of general embargo upon items of military use. At one time approximately 200 more items were on the CHINCOM list than on the COCOM list.

the state of export and submitted to the state of transit. Transaction controls, such as those maintained by the United States, are also maintained by several other Consultative Group states. Shipping and bunkering controls were imposed by members for several years to restrict commerce with Red China.

The United States maintains a permanent delegation to COCOM-CHINCOM which is directed by the Department of State with the advice of EDAC. The International Lists are revised annually and the United States delegation participates in this revision.

The tendency has been to reduce the number of embargoed items and to permit freer trade with the Soviet Bloc. This is due in part to the expanding industries of the European Consultative Group members and of Japan, the considerable dependence of these states upon foreign trade, and a shortage of foreign exchange by which supplies, particularly raw materials, can be purchased in the West. These states now receive no economic aid and the Battle Act has not been invoked to press them towards more restrictive controls because this would involve a withdrawal of military aid only. In the words of Secretary Rusk: ²¹

* * * The United States has consistently pressed for a somewhat more restrictive policy than most of the other members of COCOM would accept. We have had, therefore, to balance the advantages of maintaining the COCOM system in order that our influence might keep those restrictions as strong as possible, or letting the system disappear and finding that the COCOM controls might gradually wither away. * * *

The Battle Act has been helpful in influencing the policies of states which are not members of the Consultative Group, although the Bloc trade with these states in goods of a strategic nature has been relatively small.

The United States, consequently, has fallen back to a unilateral position with respect to its trade restrictions with the Soviet Bloc. The "Positive List" of the Department of Commerce is based only in part upon the International Lists and contains items which the International List does not embargo. A total embargo and boycott is maintained on trade with Red China, North Korea and North Vietnam, although such restrictions are not imposed by the other Consultative Group states.

Validated licenses rather than Transit Authorization Certificates

²¹ *Investigation and Study of the Administration, Operation, and Enforcement of the Export Control Act of 1949, and Related Acts* (Hearings Before Select Committee on Export Control, House of Representatives, 87th Cong., 1st Sess. Doc. 77836, 1961), 73.

are required for the transit of goods for which validated export licenses are required. American petroleum companies are prohibited from bunkering any vessel bound to or from Communist Far Eastern ports or Macao without a Treasury license and a validated license from the Department of Commerce is required for bunkering vessels or fueling aircraft which have called or will call at Far Eastern Communist ports within stated time periods.²²

Coordination of Aid Program and Trade Controls

The aid program of the United States is coordinated with the program of trade control through EDAC. The Director of the International Cooperation Administration was at one time Administrator of the Battle Act and participation in the work of EDAC by representatives of the Agency for International Development (AID) created pursuant to the Act for International Development of 1961²³ will no doubt occur. The Secretary of State is responsible under the Act for International Development for continuous supervision and general direction of the assistance programs which the Act authorizes and integrating these at home and abroad so the foreign policy of the United States is best served.

Prior to the Act for International Development of 1961 and following World War II, the aid programs of the United States emphasized: (1) reconstruction of the economies of wartime allies (as in the Greek-Turkish aid program and the European Recovery Program); (2) increasing military defenses of Free World countries; and (3) encouraging the economic development of underdeveloped countries, now usually described as "less developed" countries. The Military Assistance Program and economic aid to support military defense efforts were the largest aid projects during the 1950's.

²² See *The Strategic Trade Control System, 1948-1956: Mutual Defense Assistance Control Act of 1951*, Ninth Report to Congress (1957), 35-37; 15 CFR 371.13(2) and 371.13(3)(b)(2).

²³ P.L. 87-195, Sept. 4, 1961; 75 Stat. 424 (1961), Part I (1961). The entire Act is described as the Mutual Security Act of 1961. Part II of the law has the short title, "International Peace and Security Act of 1961." The Agency for International Development, which administers Part I, was established by Ex. Or. 10973, 26 FR 10469 (1961). The Agency supersedes the International Cooperation Administration and the Development Loan Fund. The functions of the Export-Import Bank relating to loans under section 104(e) of the Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454 (1954); 7 U.S. Code 1961 *et seq.* (1954), often called "P. L. 480" have also been transferred to the Agency. While the functions of the Agency are more embracing than those of International Cooperation Administration, it continues as part of the Department of State, its Administrator having the status of an Under Secretary of State.

These programs are now superseded in importance by attention to the “less developed” countries—using development loans, grants and technical cooperation; encouraging private investment by Federal guaranties against inability to convert earnings to dollars, foreign expropriation or confiscation, and loss due to war, revolution and insurrection; financing private business surveys; encouraging research; and contributing to the work of International Organizations in “less developed” countries. The Military Assistance program is continued, \$1,700,000,000 being appropriated by the Congress to this purpose for each of the fiscal years 1962 and 1963. The program is administered by the Department of Defense under the general negotiating and coordinating authority of the Secretary of State.

The Foreign Aid program, apart from its military aspects, now seems aimed to achieve global environmental changes. The countries aided are permitted to formulate their individual plans for development. They are given advice as to reforms; but each is encouraged to develop its own image of a “free society.”

Unlike earlier programs, which were geared to Soviet Bloc political movements, the current aid trend seems to recognize the menace of Communist action but to divorce substantially the United States aid program from a pattern of response. As stated by the President’s Task Force on Foreign Economic Assistance:²⁴

It is important that the United States, in its desire to offset these dangers, not engage in a frantic competition to outbid the Bloc’s offers of aid or seek to prevent countries from accepting aid that will help them. To react this way would involve us in waste, draw us into an undignified posture, and open us to the charge of not being sympathetic to the economic development of other countries except on our own political terms. The size and effectiveness of the Communist effort are reasons for concern and self-examination but not alarm. They emphasize the need for the United States to make its aid as effective as possible, timely, vigorous, and responsive to short-term as well as long-term considerations. If we do these things and our actions are constructive and politically wise, the aid coming from the Communist Bloc should not worry us. The increasingly effective Bloc effort is a challenge and a reminder to the United States that it cannot afford to make anything less than a major effort, designed and administered in such a way as to achieve maximum results of the right kind.

Broad and flexible authority is conferred upon the President in

²⁴ *An Act for International Development, A Summary Presentation, June 1961* (Department of State Publication 7205), 189.

the Acts for International Development and International Peace and Security, including authority to give certain kinds of aid subject to limitations in amounts despite the provisions of the Battle Act.²⁵ There is also broad authority to give "supporting assistance"²⁶ from a contingency fund; and authority to use \$50,000,000 for the funds appropriated for purposes which he need not disclose upon certification.²⁷ Action of a nature which would not be disclosed might be taken in economic warfare by the Central Intelligence Agency or some similar executive institution. However, because of its general object to secure massive environmental changes, the Aid structure does not seem to be readily adaptable for coordination with a program of trade restriction, even though EDAC is available for that purpose.

Current Economic Warfare Posture

The present economic warfare posture of the United States is one of attempting to buy "lead time" by impeding the development of Soviet Bloc economies through use of a program of export and import controls. This "lead time" is used by subsidizing its scientific development; improving the defensive capacity of its allies; and by a massive effort to change the environments of "less developed" and uncommitted countries.

The idea that wealth might be used offensively, or might be carefully focused for political ends, seems not to have been entertained seriously in the program. Congress has retained much control over the trade control and aid programs by reporting requirements and investigations. This control perhaps has discouraged initiative in the offensive use of wealth in situations sensitive in domestic politics.

It is unlikely that this United States defensive structure will undergo more than the slow mutations exhibited since World War II. Thus, any flexibility which can be developed to fend and return skillfully engineered Soviet Bloc "economic sorties" will have to be derived from laws which have never been fully utilized. One of these is Section 5(b) of the Trading With the Enemy Act of 1917. Other treaties and domestic laws remain to be explored by the responsible administrators. There will be a premium upon ingenuity and speed in administrative interpretation of existing laws.

In the past decade of active political application by the Soviet Union and Bloc states of their increasing economic strength in foreign affairs, intervention by the Soviet Union in support of the

²⁵ P.L. 87-195, Sept. 4, 1961; 75 Stat. 424 (1961), section 614 a.

²⁶ *Id.*, sections 401, 402, 451.

²⁷ *Id.*, section 614 c.

Castro regime in Cuba demonstrates the purpose and skill with which Bloc economic power can be brought to bear to support Communist political objectives. The case suggests also the importance of administrative ingenuity and speed in the United States in utilizing hitherto unutilized laws in economic warfare. The perils of defensive, cautious and well-meaning economic policies when opposed to an aggressive, carefully aimed, and coordinated Communist "economic sortie" are amply demonstrated.

B. SUGAR ECONOMIES OF CUBA AND THE UNITED STATES: THE LEGAL MILIEU FOR WEALTH BALANCE

The Cuban economy is based substantially upon the production and export of unrefined sugar. Cuba is the major sugar exporter and is second only to the Soviet Union as a sugar producer. In 1959, the first year of the Castro revolution, Cuba produced 6,577,000 tons. Of this production, 3,437,582 tons, or slightly more than half, was exported to the United States.

The United States is a closed sugar market. This means that both production of sugar within the United States and its possessions and imports into these areas are limited. The limitations are to maintain the domestic sugar price and to develop dependable sources of supply.

Sugar Act of 1948

The production and marketing of sugar within the United States was regulated in 1959 by the Sugar Act of 1948.²⁸ This Act originated as the Jones-Costigan Amendment to the Agricultural Adjustment Act,²⁹ and was carried over as the Sugar Act of 1937 when the Agricultural Adjustment Act was held unconstitutional by the United States Supreme Court.

By the Sugar Act of 1948, as in force with amendments in 1959,³⁰ the Secretary of Agriculture determined in December of each year the probable sugar consumption in the United States for the year following. This tonnage was then divided up among domestic and foreign producers in accordance with a quota system set forth in the statute.

The statute established the basic need of the United States for sugar at 8,350,000 tons. Although the actual sugar consumption at

²⁸ 61 Stat. 922 (1947).

²⁹ 46 Stat. 670 (1934).

³⁰ Amendments at the end of 1961 appear in 65 Stat. 318 (1951); 70 Stat. 217 (1956); 74 Stat. 330 (1960); and 75 Stat. 40 (1961).

the time the statute was passed was greater than this, and ever since has greatly exceeded this figure, domestic and import quotas were computed in relation to this tonnage.

A minimum quota for domestic producers was established in the statute at 4,444,000 tons. This minimum quota was allotted among domestic beet producers (1,800,000), mainland cane producers (500,000) and the remainder among cane producers in Hawaii, Puerto Rico and the Virgin Islands. To this minimum quota was added 55% of the amount by which the probable sugar consumption as determined by the Secretary of Agriculture exceeded the "basic statutory" need of 8,350,000 tons. A quota of 952,000 tons was established for the Republic of the Philippines.

Cuba received 96% of the amount by which the basic statutory need of 8,350,000 tons (or a lesser amount determined by the Secretary as the actual probable consumption) exceeded the minimum quota for domestic producers (4,444,000) plus the quota for the Philippines (952,000). Cuba also received 29.59% of the amount by which the actual probable consumption as determined by the Secretary exceeded the basic statutory need (8,350,000). This additional tonnage has always been substantial.

A minimum Cuban quota was fixed at 28.6% of the total United States consumption estimated by the Secretary if this estimate was 7,400,000 tons or less; and at 2,116,000 tons if the actual consumption was estimated at more than 7,400,000 tons. The quota of domestic producers was to be reduced *pro rata* to make up the minimum Cuban quota, although the Cuban quota has always been well above 2,116,000 tons.

Foreign producers, other than Cuba and the Philippines, received 4% of the amount by which the basic statutory need (8,350,000) exceeded the minimum quota for domestic sugar producers plus the quota of the Philippines. This foreign producer quota was prorated in accordance with a statutory scale.

Of the amount of probable consumption in excess of the basic statutory need (8,350,000) allocated to these less favored foreign producers, the Dominican Republic received 4.95%, Peru 4.33%, Mexico 5.10% and the remaining 1.03% was divided among other foreign suppliers by a formula based upon experience with their tonnage exported to the United States under earlier quota allocations.

If a domestic producer or foreign supplier failed to fill its quota, the deficit was allocated among other quota holders. If a domestic producer or Cuba defaulted, the reallocation was made first to domestic producers. If they would not fill the new quota, the allocation was to Cuba. If the Philippines failed to fill its quota,

Cuba was allocated 96% of the deficit and the other foreign producers received 4%. If any foreign producer other than the Philippines failed to fill its quota, the entire deficit went to Cuba; and if Cuba could not fill the deficit, the Secretary could allocate it.

Under the Sugar Act of 1948, Cuba thus enjoyed marketing privileges comparable to those of domestic producers. Sugar consumption in the United States was rapidly increasing. Assuming continued controls upon the acreage of domestic producers, and no significant breakthroughs in methods of production, Cuba could reasonably expect an expanding and lucrative United States market.

The United States market had special appeal for all foreign suppliers because of its high sugar price. By manipulating his estimates of probable annual consumption, the Secretary of Agriculture, although he could not control prices directly, nevertheless controlled them indirectly by increasing or decreasing domestic and import quotas, subject to the minimum quotas established. By this method, the Secretary maintained the United States price at about 2 cents per pound above the world market.

While all foreign suppliers having quotas enjoyed this price advantage, Cuba also received a 20% tariff preference on sugar imported into the United States. This preference was based on a treaty made in 1902.³¹ A tariff of 4/8 of a cent per pound was thus levied on Cuban sugar as compared with 5/8 of a cent per pound on the sugar of all other foreign suppliers except the Philippines.³² In 1959, this privileged position of Cuban producers enabled them to make approximately \$159,000,000 more upon that part of the crop sold in the United States than if the sales had been on the world market.

The favored position of Cuba stemmed in part from recognition of historic patterns in the sugar trade and in part from the close friendship existing between the two countries. But the favored position of Cuba was founded also upon intensely practical considerations.

There were important business reasons for the Cuban preference. Cuba was a major consumer of United States exports. Approximately 4/5ths of Cuba's visible imports came from the United States and

³¹ 33 Stat. 2163 (1903-5).

³² By the Philippine Trade Act, 60 Stat. 141 (1946) the Philippine quota is set at 982,000 tons annually for the period 1 January 1946 through 3 July 1974. Until 3 July 1954 the sugar was admitted duty free. For the remainder of 1954 the rate was 5% of the lowest rate charged another country. For 1955 the rate was 10% of the lowest rate charged any other country; and each year thereafter it is increased 5% until it reaches 100% on 1 January 1973.

were principally in machinery, motor vehicles, cotton manufactures, rice, wheat, flour and lard. The Cuban sugar preference supplied dollars which could be used to pay for these products. Investments by United States citizens in Cuba were greater than in any other country in the Western Hemisphere except Canada. These investors benefitted by Cuban trade with the United States which in turn depended largely upon the sugar preference.

United States nationals owned 36 out of the 116 mills producing raw sugar in Cuba. The United States corporations owning these mills also owned much land upon which sugar cane was raised.

The Atlantico del Golfo and Rionda Groups of American Sugar Mills held approximately 500,000 acres each. Cuban-American Sugar Company held 330,000 acres; and the United Fruit Company 226,000 acres. A preference for Cuban sugar meant a preference directly for a substantial number of United States stockholders.

There were important strategic grounds for the Cuban preference. Communist influence had been present in Cuba from the early years of the Depression of 1929. Special privileges for Cuban sugar producers in the United States market created jobs and established a wage level which would not have been possible if all of Cuba's sugar production had been sold on the world market.

Although the standard of living for most Cubans remained quite low, the standard was higher than in most of the rest of Latin America, and would have been lower without the United States market preference. With a decreasing standard of living, Cuba might have become increasingly vulnerable to Communist infiltration, although the pattern of Communist conquest has since suggested that its major appeal is to educated groups with a relatively high living standard.

In addition to its familiar use as food, sugar is also used in the manufacture of plastics, drugs, antifreeze, synthetic rubber, ethyl alcohol and numerous other products important in national defense. About one acre of cane produces the ethyl alcohol needed to manufacture smokeless powder sufficient to propel fifteen five-inch shells.

Cuba has supplied about $\frac{1}{3}$ of the total sugar needed for food and manufacturing in the United States and has done this at stable prices during periods of international crisis. The geographic position of Cuba simplifies the protection of cargo vessels transporting sugar to the United States. Shipping costs and insurance rates during wartime tend to be lower. Cuba was a relatively secure and dependable source of sugar and the United States was anxious to encourage and protect its reliable foreign supplier.

World Sugar Market

The bulk of the world sugar production is sold in closed markets such as in the United States under the Sugar Act of 1948. The most important of these are created by the British Commonwealth and French Agreements, although the sugar sales by Cuba in these markets would under any circumstances be less than in the United States. The trade between the Soviet Union and its satellites has some of the characteristics of a closed market since this trade is in barter or in nonconvertible currencies. For this reason trade in a Bloc market is not desirable for a country which expects to purchase Western goods.

Only about 10% to 15% of the world sugar production is sold in the "world" or "free" market, although it was here that much of the Cuban sugar production was marketed. Sugar prices in the free market tend to be both low and erratic.

The depressed free market price is caused by chronic overproduction of sugar. World sugar production was 64,625,000 tons in 1959. Of this, 7,494,000 was thrown on the free market, although there was a free-market sale of only 6,283,000 tons.

For the ten years between 1950 and 1960, world sugar consumption increased at about 5% per annum. World sugar production increased at about 10% per annum. Per capita sugar consumption is low in many countries—about three pounds per capita in Red China as compared with one hundred and one pounds per capita in the United States. This low consumption in the "under" or "less" developed countries may increase. A parallel increase in sugar production is also forecast. However, the supply is likely to continue to exceed the amount marketable. A number of countries, such as West Germany and India, were finding it difficult to market their sugar surpluses in 1961, although they had experienced no major marketing difficulty in previous years.

The erratic prices on the free market are due principally to weather and world tension. A prolonged drought in Eastern Europe in 1960 raised the price of beet sugar on the free market by reducing the supply.

When the Batista government was overthrown in 1959, the free-market price of sugar was 3.67 cents per pound. This unusually high price for the free market resulted from the threat to the Cuban supply from Castro's burning of cane fields. The price dropped to 3.1 cents per pound in February 1959, when the Cuban supply was thought assured by Batista's overthrow.

In World Wars I and II, the Korean War and the Suez Crisis,

the free-market price jumped appreciably. The price declined with alacrity when tensions were reduced.

Because of fluctuations in the free-market price, attempts have been made to attain price stability by a series of multilateral treaties. Cuba and the United States have joined in all since the first treaty in 1937.

The International Sugar Agreement in force in 1959³³ permits an International Sugar Council to set export quotas in the free market. These quotas may be above or below a basic tonnage for exporting countries which the Agreement specifies.

A minimum desired free-market price is set at 3.25 cents per pound. If the price on the free market dips below this for seventeen successive business days, the Council is required to cut export quotas by 21½% and is permitted to cut quotas by 10%. If the price falls below 3.15 cents per pound, the Council may cut export quotas up to 20%. This is the maximum cut permitted. Exporting countries (such as Cuba) agree to limit production and exports; and importing countries (such as the United States) agree to restrict imports from nonparticipating sources. All important sugar producers, with the exception of Red China, are parties to the Agreement.

The Sugar Council meets periodically to consider quotas. Voting in the Council is weighted. One thousand votes are allocated to sugar exporters (including Cuba) and 1,000 votes to sugar importers (including the United States). The number of votes allocated to each participating country differ. As importers, the United States and the United Kingdom each have 245 votes as compared to 10 votes for Ghana. Cuba has 245 votes as a sugar exporter, compared with 95 votes for the Soviet Union and 10 votes for Haiti.

Provisions are liberal for withdrawing from the Agreement after notice by the withdrawing party. Cuba, for practical purposes, is an essential party to the Agreement. Without Cuban participation the free-market price would be unduly difficult to stabilize.

Cuba has the largest free-market quota. This is 2,415,000 tons, subject to reconsideration in 1962.³⁴ So long as Cuba desires to sell sugar on the free market, it is probably in her interest to remain a party to the Agreement. If Cuba desires to withdraw from the Agreement and depress the world price by dumping her marketable sugar, there is no way in which this withdrawal can be prevented. But dumping her marketable sugar on the market without a formal

³³ 10 *U.S. Treaties* 2189.

³⁴ The Cuban quota was actually reconsidered in December 1961 on a special Cuban request for a quota increase to cover its sales to the Soviet Union. There being no agreement on this increase in the Council, the Sugar Agreement appeared on the verge of collapse.

withdrawal from the Agreement pursuant to its terms would place Cuba in violation of a treaty obligation.

Since 1959, the free-market price has tended to fluctuate below 3 cents per pound. Under these circumstances, parties to the Agreement may take unilateral action to limit exports. Cuba, in 1960, set 3.25 cents per pound as the price for Cuban sugar on the free market and the Cuban Sugar Stabilization Institute made substantial purchases to reduce the amount available for export. Because the cost of production of raw sugar in Cuba was approximately 4 cents per pound in 1959 and 1960 and the free-market price was substantially below this, the 2 cents per pound premium which Cuban sugar brought in the closed United States market was essential to make production profitable.

C. CUBAN-COMMUNIST ECONOMIC AGGRESSION AND THE RESPONSE OF THE UNITED STATES IN 1959 AND EARLY 1960

Despite the clear dependence of the Cuban sugar industry upon the closed market of the United States, the difficulties involved in diversifying agriculture and developing new industries in Cuba, and the evident interest of the United States in continuing Cuban sugar preferences, the Castro regime, sparked by its Communist elements, began a hostile campaign against the United States early in 1959. This campaign was designed ultimately to disrupt relations between the United States and Cuba, neutralize the power of Cuban moderates, and pave the way for Cuban entrance into the Soviet Bloc.

Pending the purge of moderate adherents to the regime and liquidation of the Cuban political opposition, and until a minimum program of Soviet economic assistance to Cuba could be developed, it was important to Castro that Cuban preferences in the United States sugar market be preserved. The preferences were, however, regarded as a fulcrum for political leverage by the United States and thus incompatible with the radical reorientation planned for Cuban political relations. The preferences were desired by Cuba only as an interim device to develop foreign exchange. Cuban holdings of foreign exchange were low due to withdrawals by Batista officials. These holdings were further diminished by the inept management of the Castro government.

Castro thus had to deal with a delicate problem of balance—disturbing relations with the United States sufficiently to justify his Communization of the Cuban government and liquidation of the labor unions and other potential sources of opposition while at the same time keeping the Cuban sugar quota as long as possible to tide

him over the thin years which the revelation of his Communist ties would probably bring.

The Castro regime accordingly commenced an economic offensive. This was designed to disturb the psychical equilibria of officials in the United States and delay the response of the Administration as the Communist ties of the regime received publicity.

Cuban representatives contended, first, that the Cuban sugar quota should be removed from the Act of 1948 and incorporated into a new bilateral treaty between Cuba and the United States. The ostensible purpose of this move was to prevent fluctuations in the Cuban quota by removing it from the influence of domestic politics.

The actual purpose was to develop an international legal argument to assert to forestall future disciplinary cuts in the quota.

Restoration of the Cuban sugar preferences as these existed before 1956 was also sought. The Sugar Act of 1948 had been amended in 1956 to limit Cuba's "deficit quota" to 29.6% of the excess above the basic 8,350,000 tons; 96% of this excess had been allocated to Cuba prior to 1956. While Cuba sold more sugar in the United States after 1956 than before, this increased sale had been due to an increased United States consumption. A return to the earlier formula would greatly increase Cuban sugar sales during 1960.

These demands by the Castro regime fell upon deaf ears both in the Administration and in Congress. Concern as to the nature and direction of the Castro movement had been stimulated during the late winter and early spring of 1959. Earlier hopes for moderation by Castro as the heat of victory subsided, were salted with profound skepticism concerning his personal qualities as a leader and uncertainty concerning the political orientation of many of his principal advisers.

Faced with this gradual loss of sympathy and confidence, and with the negative response to his efforts to secure guarantees of the sugar quota during 1960, Castro announced his Agrarian Reform Law. Agrarian reform had been an objective of the Castro revolution and changes in the Cuban landholding system were clearly needed. This law, however, was aimed principally at the holdings of American sugar companies.

Its terms and timing, by suspending a Sword of Damocles over the ownership of American properties in Cuba, were designed to force a continuation of the sugar preferences at least through the marketing season of 1960. The administrative discretion and flexibility derived from the vague provisions of the law permitted indefinite postponement of action to expropriate the American properties.

The Castro regime could thus publish the law but announce that no action would be taken under it until the close of the 1960 marketing season. The Sugar Act of 1948 was required by its terms to be reviewed in 1960. The threat of expropriation, coupled with the hope instilled in the corporate stockholders that Castro might be made to "see the light," might make Congress reluctant to cut or eliminate the Cuban quota despite the development of closer ties between Cuba and the Soviet Bloc.

The essential elements of the Reform Law were severance of cane grinding from cane production and restriction of ownership of grinding mills either to Cuban nationals or to corporations totally owned by Cuban nationals. Land ownership was limited to 1,000 acres per person or corporation. No cane land could be sold to a foreign national. Ninety days were allowed to convert the stock in mill corporations to Cuban ownership.

Compensation for the expropriated property was to be in 4% Cuban bonds payable in 30 years. The basis of compensation was to be the tax value of the land prior to 10 October 1958. In 1958 the assessed tax value had been a small fraction of the market value. After the Reform Law was published, the market value of cane land promptly dropped from \$16,800 per hundred acres to \$7,800 per hundred acres.

Coupled with the threat by the Castro regime, intended to influence United States domestic commercial interests, 140,000 United States stockholders being affected by seizure of the sugar properties, were restrictions placed upon imports from the United States into Cuba. These restrictions had the dual object of lessening the outflow of foreign exchange from Cuba and bringing home to American exporters the importance of the Cuban market.

These efforts by the Castro regime to influence domestic commercial interests and opinion generally in the United States raised questions concerning Cuba's obligations pursuant to Articles 15 and 16 of the Charter of the Organization of American States. These Articles state:

Article 15: No state, or group of states, has the right to intervene directly or indirectly, for any reason whatever in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force, but also any other form of interference or attempted threat against the personality of the state or against its political, economical and cultural elements.

Article 16: No state may use or encourage the use of coercive measures of an economic or political character in order to

force the will of another state and obtain from it advantages of any kind.

While it is doubtful this action by the Castro regime was of an intensity constituting a violation of Article 16 of the Charter, the various measures in their timing and administration seemed designed to force the wills of members of the Executive Branch and Congress. The measures were only partly bona fide agricultural reforms and limitations upon the outflow of foreign exchange.

Cuban Sugar Situation in 1959 and 1960

During 1959, despite a 20% cut in the free-market quota by the Sugar Council, the price dropped to 2.55 cents per pound. The Soviet Union purchased 500,000 tons of Cuban sugar in 1959. However, this purchase was at the free-market price and substantially below the cost of production.

Although a backlog of 1,000,000 tons would probably be carried over by Cuba from 1959 into 1960, the prospect for production during 1960 was poor. Faced with possible expropriation of their mills and land, the sugar operators were reluctant to make the major repairs necessary for the 1960 grinding season. Banks were unwilling to lend to the smaller producers. The wages for many laborers in 1959 were unpaid. Labor unions, which had accepted a moratorium on wage increases during 1959, were preparing to make new claims during 1960. Counterrevolutionary activity, including sabotage of sugar mills and burning of cane fields, was commencing in Las Villas and Oriente Provinces. Refugees from the Castro tyranny were organizing throughout the Caribbean.

These domestic problems with which Castro grappled increased slightly the free-market price of sugar. But the tables could be quickly turned. The sugar which Cuba probably could produce in 1960 plus the carry-over from 1959 would be channelled into the United States quota for 1960. This was estimated tentatively by the Secretary of Agriculture at 3,119,655 tons.

If this quota was quickly reduced in 1959 or early 1960, the rejected tonnage would be thrown into the free market. This would force down the free-market price and the price would quite probably remain low with the prospect of the entire Cuban supply being marketed in a competitive pricing system.

Cuba might or might not go to the International Sugar Council to seek an increase in her free-market quota. If sufficient sugar was produced in 1960 to require this increase and the consent of the Sugar Council could not be obtained, the unsold surplus would have to be carried over into 1961; sold in a new market, such as Red China, from which little foreign exchange could be obtained; sold

in the free market in violation of the Sugar Agreement; or sold in the British or French markets. Neither England nor France might agree to these imports. Sugar sales would not be profitable in any event unless the sugar entered a closed market providing a price premium.

*A Possible Defensive Scheme for the United States
Employing Economic Sortie Techniques*

The most effective economic defense which the United States could have mounted against the Castro regime in 1959 or early 1960 would have been aimed to disturb the psychical equilibria of key members of the regime elite.

First, the plan to curtail or eliminate the sugar quota should be promptly disclosed. Castro should be notified explicitly what was desired in return for continuation of the quota. Second, if Castro did not respond promptly to this notification, withdrawal of the quota should be executed rapidly. Coupled with this withdrawal should be a clear commitment that the quota would be restored if Castro met the terms proposed. Third, the quota should be restored if Castro met the terms.

To achieve the most intense economic impact upon the Castro regime, manipulation of the sugar quota should be supported by simultaneous economic action of other types. Thus, an embargo, boycott and financial controls should be imposed upon Cuban transactions under Section 5(b) of the Trading With the Enemy Act of 1917.³⁵ These measures should be hinged upon the same conditions prescribed for restoration of the sugar quota.

A partial embargo, in fact, was imposed in October 1960, under the Export Control Act of 1949. This embargo covered all materials except nonsubsidized foodstuffs, medicines and medical supplies.³⁶ But the embargo came too late for its pressure to be coordinated with that of withdrawal of the sugar quota.

The action suggested would have invited grave risks in 1959 and early 1960. Castro might not respond by agreeing to negotiate outstanding differences between Cuba and the United States or by conceding other points pressed by the Administration. He might, as he later did, commence a general confiscation of American assets and patently cast his lot with the Soviet Bloc.

If these further actions were taken by the Castro regime, the United States should be prepared to move for *joint* economic sanc-

³⁵ See Fn. 8, *supra*, and discussion of the provisions of Section 5(b) in the related text.

³⁶ 25 *Federal Register* 8638 (1960).

tions imposed by the Organization of American States. Action should be taken to preserve the *status quo* pending a decision by that Organization. This action should probably be, for greatest effectiveness, a naval blockade or quarantine of Cuban ports. Justification could be offered for such a blockade or quarantine based upon its basically defensive nature and upon its international administrative function as a *status quo* maintaining device. Maintaining the *status quo* politically would give the Organization time for mature consideration of the issues and increase the effectiveness of military or economic measures it employed.

The scheme of action here suggested was not followed by the United States in meeting the Castro economic sortie. While perceptive moderate advisers of Castro remained in 1959 and early 1960, a defensive economic sortie might have influenced Cuban policy in a direction desired by the United States.

As the United States delayed its responsive action, in part due to legal problems in organizing its defense, the structure of the Castro power elite began to change. Members of the elite who could make the required decisions became difficult to identify.

An effective defensive economic sortie at this later stage would have imposed a heavy intelligence burden and would have required a period of intense psychological preparation of the target elite. The United States consequently fell into a posture of protracted harassment in economic warfare with Cuba; and due in part to intervention by the Soviet Union became locked in this position.

Problems created by protracted harassment have been discussed in Chapter I. What were the reasons for this delay of the United States in organizing its economic defense?

D. DIFFICULTIES IN ORGANIZING THE UNITED STATES DEFENSIVE POSITION

Lack of Economic Warfare Professionals

Apart from the very evident good faith with which the United States commenced relations with Castro Cuba, the major reason why no prompt response was made to the Castro economic sortie lies in the absence of a corps of specialists in economic warfare within the Administration to advise the President.

Had the Castro regime launched a military attack upon the United States, this action could have been met promptly and effectively by professional specialists in military violence. There were no specialists in economic violence. This fact invited the Castro regime to launch its economic sortie.

The foreign economic program of the United States was geared to developing scientific "lead-time," buttressing military defenses, and altering the environments of underdeveloped countries. The domestic economic program was geared to evolution of a dynamic and growing industrial, investment and employment structure. Persons associated with these programs had not developed perspectives enabling them to advise an economic sortie designed to obtain a decision or pattern of decisions from key members of an adversary power elite. The roots of the difficulty reached back to the abandonment of economic violence following World War II and the concepts of foreign assistance which developed in its aftermath.

Various persons in the United States during 1959 suggested the Cuban sugar quota be cut or eliminated, the Cuban premium of 2 cents per pound on the United States market be abandoned, or the tariff preference for Cuba be jettisoned. The Administration nevertheless proceeded cautiously. This caution seems to be justified in view of the facts and law as members of the Administration perceived these at the time.

Intelligence Problem

Although Soviet Bloc control of the Castro regime *now* appears to have been extensive before and after the Castro success in 1959, this was not equally clear in 1959 and early 1960. The actual state of United States intelligence upon this point will not be publicized. However, it is probably accurate to assume that either little was known at the time concerning the extent of Communist control or, if there was information upon the point, the facts were in much conflict.

International Legal Considerations

The Administration was anxious to conform to the requirements of international law in its dealings with the Castro regime, had a sincere desire to preserve amicable relations between the countries, and hoped to avoid needless injury to the Cuban people.

During the heated debates in Congress in 1960 concerning the Cuban sugar quota, Secretary of State Herter carried with him constantly Articles 15 and 16 of the Charter of the Organization of American States typed on a filing card so he could refer instantly to them in his discussions with members of the Congress.³⁷ Article 16, mentioned previously, forbade a state to use "coercive measures of an economic nature to force the will of another state and obtain from it advantages of any kind."

³⁷ Reston, *New York Times*, 1 July 1960, p. 24, col. 3.

The Administration was also concerned that action of the United States be consistent with the purposes and principles set forth in Articles I and II of the United Nations Charter. Although no provisions of the Charter expressly obligated the United States to refrain from economic action against a member of the Organization, there was a requirement that members of the Organization settle their international disputes by "peaceful means in such a manner that international peace and security, and justice, are not endangered." This might be used to support an argument that the United States "endangered peace or security" or "denied justice" by terminating an economic privilege upon which Cuba relied.

A more direct difficulty was presented by the General Agreement on Tariffs and Trade (GATT), a multilateral executive agreement, to which the United States and Cuba are parties.³⁸ As an executive agreement on the part of the United States, GATT has the obligatory effect of a treaty. GATT posed difficulties which might be encountered both in reducing the sugar quota and in eliminating the Cuban tariff preference on sugar, each being moves urged upon the Administration.

By Article XI of GATT, no prohibition or restriction, other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be placed on the imports from or exports to any other contracting party. Restrictions upon imports of agricultural products are excepted from application of the Article when these restrictions support enforcement of domestic restrictions upon like products. Nevertheless, any such restrictions must not reduce the total of imports relative to the total domestic production, as compared with the proportion which reasonably might be expected to rule between the two in the absence of restrictions.

The Article is intended to accommodate a quota system, such as that used by the United States to control imports and production of sugar; but the Article is intended also to preserve the normal pattern of all imports of sugar as against all domestic production of sugar. If the United States eliminated the Cuban sugar quota

³⁸ 61 Stat. A5 (1947). GATT originated from tariff negotiations at the Geneva Conference of 1947 while the Havana Charter was in process of drafting. The Havana Charter and the International Trade Organization to be established under it failed because of the decision of the President not to submit the Charter to the Senate. Other states were unwilling to participate without the United States. GATT, however, has served as a point for institutional growth of the demands expressed in part in the Havana Charter, although the scope of GATT is much narrower. The most comprehensive text concerning GATT is V. A. Seyid Muhammad, *The Legal Framework of World Trade* (1958).

and, in its distribution of the deficit, showed preference to domestic producers, thereby altering the pattern of domestic production *vis-à-vis* imports, the United States might violate the Agreement.

By Article XIII of GATT, no prohibition or restriction shall be placed by any contracting party upon imports or exports of any other contracting party unless the prohibitions and restrictions are likewise applied to all third countries importing or exporting like products. Paragraph 2 of this Article states in part:

In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such produce approaching as closely as possible to the shares which the various contracting parties might be expected to obtain in the absence of such restrictions, and to this end shall observe the following provisions: * * *

(d) In cases in which a quota is allocated among supplying countries, the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the produce concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate. * * *

An argument may be made under Article XIII that the Cuban quota could not be eliminated by the United States unless the quotas of other foreign suppliers who were parties to the Agreement were eliminated; that Cuba was entitled to a quota based upon historic trade patterns; and that entry duties to compensate for the American market premium should not be imposed to reduce the value of the quota to Cuba.

By Article XXI of GATT, a contracting party may take any action which it considers necessary for the protection of its essential security interests if, among other circumstances, "taken in time of war or other emergency of international relations." Escape from the restrictions of GATT would thus require ability to argue either that a "war" or "an emergency of international relations" existed.

An emergency of the type contemplated by the Agreement possibly could not have been urged convincingly in 1959 or early 1960.

The Cuban-American tariff preferences are expressly excluded from the general "most favored nation" treatment of customs duties and charges set forth in Article I of GATT. These preferences were continued in a separate "Exclusive Agreement" between the United States and Cuba.³⁹ Although supplementary to GATT, the Exclusive Agreement is not a part of it.

The Exclusive Agreement was a potential impediment to manipulating the Cuban tariff preference. This was one of the measures proposed to the Administration. The Agreement contained no provision for termination other than withdrawal of either Cuba or the United States from GATT. Under the Protocol of Provisional Application of GATT, which remains operative, any party to the Agreement can withdraw by giving 60 days' notice. This satisfies the requirement of a termination provision in trade agreements made in the Reciprocal Trade Agreements Act.⁴⁰

But unless either Cuba or the United States was prepared to withdraw from GATT, the only other mode of termination would be by mutual agreement. A United States withdrawal from GATT would forfeit the tariff and trade privileges which this Agreement confers. This would be a heavy price to pay in order to manipulate the Cuban tariff.

The Exclusive Agreement was not subject to the important security exception set forth in Article XXI of GATT. Furthermore, even if the Exclusive Agreement was terminated, other agreements came into operation which contained statements of termination time and would delay the tariff manipulation.

The Exclusive Agreement suspends operation of the Reciprocity Convention between the United States and Cuba of 1902⁴¹ and the Reciprocal Trade Agreement between the United States and Cuba of 1934.⁴²

The Reciprocity Convention conferred the 20% tariff preference upon Cuban products. Article XI of this Convention contains a termination provision one year after notice by either party.

The Reciprocal Trade Agreement of 1934 suspends the Reciprocity Convention, continues the 20% preference, and provides for termina-

³⁹ 61 Stat. 3700 (1947).

⁴⁰ 48 Stat. 943 (1934), Section 2(b). The trade agreements must be subject to termination not more than three years after the time the trade agreement comes into force; and if not then terminated, shall be terminable on not more than six months' notice.

⁴¹ 33 Stat. 2163 (1903-5).

⁴² 49 Stat. 3559 (1935-6).

tion upon six months' notice. An exchange of letters between the heads of the United States and Cuban delegations after the Exclusive Agreement was made clarifies the point that the United States can terminate either the Reciprocal Trade Agreement or the Reciprocity Convention while the Exclusive Agreement is in force.⁴³ But the time limitations in the earlier agreements still apply.

Thus, pursuant to the exchange of letters, the United States can give notice of its intention to withdraw from GATT (60 days), thereby negating the Exclusive Agreement, and notice of its intention to terminate the Reciprocal Agreement and Reciprocity Convention. The time limit of the Reciprocity Convention (1 year) would be the time which must expire before the tariff could be manipulated.

Threat to American Assets

In addition to the international legal complications which action pertaining to Cuba potentially invited, approximately a billion dollars in American assets were at stake. It was amply clear from enactment of the Agrarian Reform Law and from the preparedness of the Castro regime to make *ad hoc* changes in the Cuban laws, that a campaign against American property would commence if the Cuban sugar quota was reduced or eliminated.

Import restrictions applied by Cuba to American products would damage exporters of machinery and textiles and producers of wheat, rice and lard, all of these items having been in heavy demand in the Cuban market. If the Administration proceeded to "wield the axe" without the participation of Congress, the reaction from the economic losses suffered by voters might be reflected in the alignment of votes in the approaching elections.

Domestic Legal Problems

While the President probably possessed emergency powers to block imports of Cuban sugar and perhaps take other action, such powers being implied from his authority as Commander in Chief and from his responsibility for the conduct of foreign affairs, the scope of these implied powers was not beyond debate. The existing statutes under which he might act also required findings of fact which would be difficult to make or required action of a more precipitate nature than the Administration was prepared to take unilaterally in view of the approaching election. The latter was probably the reason for the hesitancy of the Administration in invoking the Trading With the Enemy Act of 1917, although

⁴³ 61 Stat. 3705 (1947).

invoking this Act might also lead to action in the Organization of American States in which the Administration did not appear ready to proceed.

Pursuant to the Trade Agreements Extension Act of 1951,⁴⁴ the President can terminate a customs preference or end a quota of "any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement." In early 1960, action under this statute would require a determination by the President that Cuba was Communist controlled. This determination might be difficult to support in view of the intelligence apparently available.

Under the Tariff Act the President can impose additional duties not to exceed 50% *ad valorem* of the property concerned or forbid the importation of property when a foreign country discriminates in fact by law or administrative regulation against the commerce of the United States. The President must find the public interest will be served.⁴⁵

Although there had been some discrimination against United States commerce at this time, there had not been a great deal. The position of the Castro regime concerning United States commerce had been limited to extravagant threats of action.

Action under either the Trade Agreements Extension Act or the Tariff Act might support an argument that the United States had breached a current executive agreement, such as GATT. Determination when the facts were still equivocal of either Communist control of Cuba or discriminations against United States commerce might damage the moral position of the United States, especially in the Organization of American States.

Unilateral action by the United States against Cuba might solidify the impression in Latin America, assiduously cultivated by Castro, that Cuban-American difficulties were derived from an effort by the United States to "retain" Cuba in "economic bondage." Castro could portray his regime as engaged in an heroic struggle against greater power and odds; mobilize the support of anti-United States elements throughout Latin America; engage the sympathy of Latin American governments, which in earlier years had struggled with the problem of land reform; and palm off his difficulties with the United States as an affair in which he was entitled either to Latin American support or to Latin American neutrality.

⁴⁴ 65 Stat. 72 (1951), Section 5; 19 U.S. Code 1362.

⁴⁵ 46 Stat. 704 (1930) ; 19 U.S. Code 1338.

The United States was committed to joint action in Latin America in economic and security matters, and the Administration understandably took the view that the problems created by Castro were of such a nature that all American states should assist in solving them. It was important that a purely bilateral dispute between the United States and Cuba not be allowed to develop.

Sequence of Events in 1959 and Early 1960

Throughout the first half of 1959 there was justification for the belief that differences between the United States and Cuba were amenable to settlement by negotiation. An Agrarian Reform Program was clearly within the general authority of the Cuban government. It seemed equally clear under international law that the method, time and amount of compensation were inadequate.

The seizure of several American owned mills in the latter part of 1959 for sabotage of the 1960 sugar crop (failure to plant or maintain machinery) was arbitrary and without warrant under Cuban law, no hearings being given to the owners or receipts being tendered. These issues were fairly clear-cut, and there was no reason to suppose that a settlement could not be reached when the emotion of the revolution had subsided.

During the latter half of 1959, however, the economic and political ties of Cuba with the Soviet Bloc became increasingly apparent and the hope of a settlement of claims by negotiation more remote. Moderate, or potentially anti-Communist, members of the Castro regime were purged and replaced by officials with a Communist record or Communist bias. Judges and lawyers fled the country in large numbers. No move was made by the Castro regime to secure economic aid from the United States, although aid would have been forthcoming if requested.

When the Congress met in 1960, the Administration was prepared to seek standby authority in the President to reduce the sugar quota of any foreign country except the Philippines when he found and proclaimed that a reduction was necessary to protect the national interest. No cut in the quota by the Congress was sought.

The request was limited instead to a grant of flexible executive power so the quotas could be manipulated if the need arose. This would avoid action under the Tariff law and the legal complications that might arise under GATT and the separate Cuban agreements.

The President or Secretary of Agriculture could not vary the minimum quota as the Sugar Act then stood. Variations in the quota above this minimum would require changes in the Secretary's estimates of probable annual consumption. These changes would

certainly disturb radically the price structure and producer and consumer interests within the United States.

The request for authority by the Administration, unfortunately, came too late. Much time was to elapse before Congress could change the law. Although the President then took action promptly, the Soviet Union had, in the meantime, launched its economic sortie, cut away the remaining ground supporting the moderate opposition to Castro in Cuba, and lashed Cuba securely to the Bloc economy and political structure.

No amendment to the Sugar Act of 1948 was passed by Congress until 3 July 1960. Then shortly before the recess of both Houses for the National Conventions, and after bitter debate, a standby power different from that requested by the President was granted. In the interim, tension between Cuba and the United States increased and Cuba succeeded in harvesting and shipping most of its 1960 sugar crop.

Initial caution by Congress seems to have stemmed from the surge of threats from the Castro regime that the property of American nationals would be confiscated if the sugar quota was reduced. The effect of these threats apparently became less as the policy of the Castro regime became clearer eventually to confiscate this property no matter what was done with the sugar quota. In the late spring of 1960 the Castro threats appeared to induce action by Congress rather than instill caution.

Problem of Allocation of the Sugar Deficit

A perplexing problem woven in and out of the debates was the mode of disposition of the sugar deficit if the Cuban quota was vacated. Just as the Administration proceeded gingerly in its action against Castro through apprehension of the effect of confiscations of American property upon the forthcoming elections, so Democratic members of Congress feared the President might re-allocate the Cuban sugar quota to influence domestic sugar beet and cane growers to vote in favor of his party during an election year. Lobbying was intense by both domestic and foreign producers who desired a slice of the Cuban share.⁴⁶

A long-term problem concerned the possible effect of vacation of the Cuban quota upon the regulatory system of the Sugar Act of 1948. Administrative practice had been developed to support the quota system. Prices were controlled indirectly in a manner which

⁴⁶ An interesting account of the tribulations of both Houses shortly before the amendment was passed, including a description of the lobbying activities, appears in *New York Times*, 4 July 1960, p. 2, col. 1.

seemed generally satisfactory. The quota system meshed nicely with acreage controls upon domestic producers imposed under other statutes.

If Cuba no longer furnished a large part of the United States requirements, then the quota system, for foreign suppliers at least, made little sense. A major reduction in the Cuban sugar quota would quite probably require reconsideration of the policy underlying the 1948 Act.

The Amendment, as finally passed, extended the Sugar Act until 31 March 1961 and empowered the President to set a new Cuban sugar quota for 1960 and for the first quarter of 1961.⁴⁷ The President was authorized to reallocate to domestic producers 160,000 tons which Cuba in turn had been reallocated from a deficit by Hawaii and Puerto Rico. Portions of the regular Cuban quota, if the quota was reduced, were to be reallocated in stipulated proportions among foreign suppliers.

The Amendment was viewed as a temporary expedient until the Sugar Act of 1948 could be considered by Congress in greater detail either after the recess for the National Convention or in the new session of Congress following the Presidential elections.

When it became evident that an amendment would pass before Congress recessed, passage of the amendment having been for some time in doubt, Cuban suppliers hastened to load ships under the existing quota. By the time the Secretary of Agriculture suspended Cuban sugar imports, pending action by the President pursuant to the Amendment, and despite a prompt increase in ocean shipping costs, only 740,000 tons of the 1960 Cuban quota remained unfilled. This balance was reduced by the President by 95% on 6 July 1960.⁴⁸

While the Fabian strategy of the Castro-Communist regime, with the other factors hitherto noted, had contributed to a delay in Amendment of the Sugar Act until the Cuban quota for 1960 had been substantially filled, it was virtually certain that the Cuban quota for the first quarter of 1961 would be eliminated. It was also generally considered that Congress would extend the power of the President to set the Cuban sugar quota through 1961. Since the Castro regime could not survive indefinitely on the dollars acquired during 1960 and upon confiscated American assets, its survival depended upon the speed and freedom with which Soviet Bloc assistance could be provided.

⁴⁷ 74 Stat. 330 (1960).

⁴⁸ 25 *Federal Register* 6414 (Proc. 3355, 1960). Reduced to 39,752 short tons raw value plus sugar certified prior to 3 July 1960 but not yet entered or withdrawn from warehouse for consumption.

E. THE SOVIET BLOC "ECONOMIC SORTIE" AND TERMINATION OF UNILATERAL POLICY BY THE UNITED STATES

The gap widening between the United States and Cuba in late 1959 and early 1960 provided a convenient entrance for a practiced and adroitly directed Soviet economic wedge. The groundwork had been laid during the Batista regime. The major Soviet problem was one of timing in order to complete the breach and smash Cuban internal opposition to Castro.

Soviet sugar purchases from Cuba—made for political reasons since the Soviet Union was then a major sugar producer—commenced with an order for 500,000 tons in 1954. These orders were reduced gradually during the Batista regime to a low of 182,148 tons in 1958.

These transactions enabled the Soviets to make contact with the Cuban sugar industry and officials in the Cuban government with economic functions even though diplomatic relations between the Soviet Union and Cuba were not maintained. By 1958, however, Cuban trade had not been reoriented towards the Soviet Bloc.

After the Castro revolution in 1959, a Soviet order for Cuban sugar was announced. This was of 170,000 tons at 2.58 cents per pound. The sale was from holdover sugar owned by the Cuban Sugar Stabilization Institute. Payment was in dollars and furnished badly needed foreign exchange to the Castro government. An additional purchase of 330,000 tons was made in October at 2.905 cents per pound. A total of 500,000 tons was thus purchased during 1959.

The visit of Mikoyan and a Soviet Trade Delegation to Cuba coincided with the beginning of consideration of the Sugar Act of 1948 in the United States Congress. During Mikoyan's visit a cabled order for 345,000 tons at 2.78 cents per pound was received from the Soviet Union; and on 13 February 1960, a trade agreement between Cuba and the Soviet Union was announced. The Soviets agreed to purchase 5,000,000 tons of Cuban sugar over a period of five years and to extend Cuba credit to \$100,000,000 repayable in goods or dollars in twelve equal installments at 2½% interest.

Of the 5,000,000 tons which the Soviets agreed to purchase, 1,375,000 tons were to be paid for in dollars at the free-market price prevailing at the time of purchase. The remaining tonnage was to be paid for in Soviet goods.

The Agreement listed crude and refined petroleum, wheat, metals and newsprint, caustic soda and unspecified types of machinery as the articles of Soviet barter. Dollar values of the goods and the quantities of each to be delivered were not specified, these matters being left to supplementary bilateral agreements. In addition to her

sugar, Cuba was to export fruits and juices, vegetables, fibers and hides to the Soviet Union.

Cuban spokesmen stated the agreement prohibited resale in Cuban markets of the sugar sold to the Soviet Union. This prohibition would not prevent the Soviets from selling their domestic production in Cuban markets and replacing this deficit with Cuban sugar, nor would it prevent sale of sugar by the Soviet Union to the satellites and resale by the satellites in Cuban markets.

If the Soviets followed either of these courses, they might be able, despite the efforts of the International Sugar Council, to disturb the world market, force down its price and destroy the traditional Cuban markets. This would increase the dependence of Cuba upon markets behind the Iron Curtain.

When the Mikoyan Agreement was announced, Cuban representatives stated they were assured of markets for 700,000 tons in Japan, 200,000 tons in Morocco and 500,000 tons in Red China. The Japanese and Moroccan markets would be within the free-market quota held by Cuba. The Red Chinese market was a "new" market and not subject to the restrictions which the International Sugar Council might impose.

The publicity received by these manifestations of accord between Cuba and the Soviet Bloc gave new hope to those in the United States and abroad who desired shares in a reallocated Cuban sugar quota. Pressure for a quota cut was increased upon both Congress and the Administration.

Considering himself adequately supported in view of the public announcements by his Soviet allies, Castro was emboldened to increase his attacks upon the United States and elaborate his threats to United States property in Cuba. He reinforced his threats by seizure of the Santiago de Cuba Oil Refinery of Texaco, Inc., on 29 June 1960 after refusal by its management to refine Soviet crude oil imported under the Mikoyan Agreement. On 2 July 1960, he seized for the same reason the remaining two refineries in Cuba, Esso (Cuba) Inc., a subsidiary of Standard Oil Company (New Jersey) and Shell Petroleum Corporation of Cuba, owned by Canadian Shell Ltd., a subsidiary of the Royal Dutch Shell Group.

After Congress passed its amendment to the Sugar Act of 1948 on 3 July 1960, and about fourteen hours before the President announced his reduction of the Cuban sugar quota, the Cuban Council of Ministers amended the Cuban Constitution to permit nationalization of property of United States citizens, confiscation of property of persons found guilty by special courts of antirevolutionary activities, and confiscation of property of those who fled the

country to escape trial and “who are conspiring abroad” against the regime.

Having anticipated Castro would probably carry his threats against American property into execution when his Soviet allies were publicly committed to his support, the United States, as its first step in multilateral action, submitted on 20 June 1960, a detailed memorandum to the Inter-American Peace Committee on the Organization of American States. This memorandum, entitled “Provocative Acts of the Government of Cuba Against the United States Which Have Served to Increase Tension in the Caribbean Area,” set forth in detail the facts of Cuban-American relations since the Castro revolution. The Committee was informed that the United States would continue to provide other information relevant to the Committee’s studies.⁴⁹ Submission of the Memorandum was a prelude to presentation of the case of the United States to a meeting of the Council of Foreign Ministers of the Organization of American States.

In the interim, Minister for External Affairs Roa of Cuba, on 11 July, charged before the Security Council of the United Nations that the United States had intervened in Cuban internal affairs and had committed acts of economic aggression.⁵⁰ The acts of economic aggression cited were “continued threats of economic strangulation,” influencing Cuban oil refineries to refuse to process crude oil owned by the Cuban government (the oil in question being that imported under the Mikoyan Agreement) and the extraordinary power granted the President by Congress which he had exercised to reduce the sugar quota.

By a formula devised by the two Latin American members of the Security Council, Ecuador and Argentina, the Cuban complaint was inscribed in the Agenda of the Security Council without objection by the United States. It was understood by Cuba, the United States and the remaining members of the Security Council that when Cuba had its hearing, the Council would adjourn consideration of the dispute pending a report by the Organization of American States. Such a resolution was adopted by the Council on 18 July 1960. Other countries were urged by the Resolution to refrain from action which might increase tension between Cuba and the United States.⁵¹

Tension was stimulated rather than reduced. During July 1960, Castro frantically tightened his economic and political ties with

⁴⁹ *U.N. Doc.*, S/4388, 20 June 1960.

⁵⁰ *U.N. Doc.*, S/4378, 11 July 1960.

⁵¹ *U.N. Doc.*, S/4395, 19 July 1960.

the Soviet Bloc. Chairman Khrushchev had been quick to condemn the cut in the Cuban sugar quota as "aggression"; and the Soviets agreed to purchase from Cuba the unfilled part of the United States quota for 1960 for dollars. The price was below the cost of production but furnished Cuba with needed foreign exchange.

On 14 July 1960 a Red Chinese trade delegation arrived in Cuba and contracted for sugar purchases of 500,000 tons per year for five years. Twenty percent of the deliveries in the first year were to be purchased in pounds sterling. Payments for the remainder of deliveries during the first year and all payments in subsequent years were to be in goods.

The Red Chinese sale was in a new market, and consent of the International Sugar Council to an increase in Cuba's free-market quota was not required. The consent of the Council was required for that part of the United States quota for 1960 sold to the Soviet Union which exceeded the free-market quota of Cuba. The United States was not active in opposing the Cuban request for an increase.⁵² This inaction probably marks an abandonment of hope by the Administration that purely unilateral measures by the United States in reducing or eliminating the sugar quota would affect significantly either the policies or the stability of the Castro regime.

Not only were Cuban requests for quota increases usually treated with deference by the Sugar Council because of Cuba's importance as a party to the International Sugar Agreement, but any action by the United States to oppose the quota increase would have been substantially without support. Only those Latin American states which had begun to appreciate the danger of Communist direction of the Castro regime and which had no significant economic stakes in Cuba would wholeheartedly support the United States position. Most of these were not parties to the Agreement or had few votes in the weighted voting system.

Canada, Japan, the United Kingdom and the allies of the United States in Western Europe viewed the contest with detached interest and could appreciate the potential market which Cuba might offer as its imports from the United States declined. None of these countries had reduced their purchases of Cuban sugar and it is most unlikely that any would have been prepared to alienate Castro by supporting a United States effort to block a sale of several hundred thousand tons.

From the point of view of the United States, the possible effect to be obtained upon the Castro regime by frustrating the sale of the remainder of its 1960 U.S. quota probably was not worth the

⁵² See *New York Times*, 20 July 1960, page 7, col. 3.

diplomatic effort which would have been required to secure the necessary backing in the Council.

The Council also considered the Cuban request after the United States had submitted its memorandum of 20 June 1960 to the Inter-American Peace Committee and the Security Council had made its Resolution of 18 July. With the United States policy reoriented to multilateral action in the Organization of American States, unilateral pursuit of Cuba into the Sugar Council would lend credence to a Cuban argument that the United States rather than Cuba was the aggressor in the conflict.

Unilateral action was taken by the United States after the Security Council Resolution of 18 July. But these measures can be considered little more than an effort to minimize the disruptive influence of the Castro regime in other Latin American countries by denying to it a supply of dollars and to preserve the *status quo* to the extent possible until the Organization of American States could consider the dispute.

In a strategic sense, these additional economic measures were delaying actions in a retreat from an unsuccessful economic defense. The United States, for example, prohibited the use of International Cooperation Administration funds to purchase Cuban sugar.⁵³ Morocco, Iran and South Vietnam had been substantial Cuban customers. This move tended to shift the trade from dollars to barter. Morocco, for example, agreed to ship phosphate, sardines, trucks and other items to Cuba in return for sugar. In October 1960, the President placed an embargo upon export from the United States to Cuba pursuant to powers granted by the Export Control Act of 1949.⁵⁴ Excepted from the embargo were unsubsidized foodstuffs, medicines and medical supplies.

The embargo was supported by uncoordinated private action by creditors of Cuban importers or of the Cuban government. There being many unpaid Cuban accounts in the United States, sales of unembargoed items were for cash in advance. Creditors levied upon a number of items earmarked for export to Cuba, such as lard and diesel engines. They also blocked export of these items.⁵⁵

As the United States took its action supplemental to reduction of the sugar quota, Castro commenced his expropriation of American property in Cuba. The Delicias and Chaparra Mills of American

⁵³ See *New York Times*, 20 August 1960, page 1, col. 2.

⁵⁴ 25 *Federal Register* 8638 (October 1960).

⁵⁵ See, *Trade with Cuba* (Hearings Before the Committee on Interstate and Foreign Commerce, U.S. Congress, House of Representatives, 87th Cong., 1st Sess. Doc. 75553, 1961) 25.

Sugar Company were seized on July 20th and the Mercidita Mill on July 22nd. On August 9th the general confiscation began. By the summer of 1961, approximately a year later, an estimated ten to fifteen million dollars out of an original billion dollars in American assets in Cuba remained in American hands. The reimbursement promised by the Castro regime was to be in fifty year Cuban bonds, payable from 25% of the receipts from all Cuban sugar sold in the United States in excess of 3,000,000 tons per year at a price of not less than 5.4 cents per pound. The expropriations were accompanied by the imposition of discriminatory licensing requirements upon United States goods, discriminatory duties, and reallocation of the United States rice quota to the Soviet Bloc.

While this action by the Castro regime provided a legal basis for the abrogation of trade treaties with Cuba and an additional basis for complaint concerning Cuban actions before the Organization of American States, it also increased the dependence of the Castro regime upon the Soviet Bloc for markets and for technical assistance in operating expropriated American businesses and industries.

By 1961, approximately 70% of the trade with Cuba was with the Soviet Bloc and the remaining 30% with other European or American states. The Soviets agreed in September 1960, to purchase all of the sugar which Cuba had formerly sold to the United States. The International Sugar Council was persuaded to increase Cuba's free-market quota by 3,000,000 tons to compensate for loss of the United States market.

By the winter of 1960, the Soviet Union and satellites had commenced their destruction of Cuban markets through dumping. Quantities of Soviet sugar were offered on the London market below the prevailing market price.⁵⁶ Poland and Czechoslovakia offered refined sugar on the London market for less than the price of raw. Similar sales were made in Iraq, Ceylon and the Sudan.

By a trilateral form of dumping, Cuban sugar became a species of currency for the satellites. A satellite bartered goods for Cuban sugar and then either bartered the sugar before shipment or sold it to other Bloc or non-Bloc countries. The shipment was then directed to the third party. These transactions became institutionalized, so that the satellites have become middlemen, standing between Cuba and her old markets, and ready to compete in any new markets Cuba might seek to develop.

Cuba thus was forced into a position in which production costs had to be lowered by the use of unskilled volunteer labor in cane

⁵⁶ See *New York Times*, 10 March 1961, page 38, col. 3; 10 January 1961, page 69, col. 1.

harvesting to continue to obtain foreign exchange in the free market. Also, increasingly larger quantities of sugar had to be exported at increasingly lower prices to attract new markets and offset the "market-destroying" effect of Soviet Bloc state trading practices.

The Cuban request for an increased free-market quota to permit this expansion was opposed by the Soviet Union in the International Sugar Council in December 1961. The Council entered 1962 deadlocked on the issue of quota increases.⁵⁷

Although Cuba had since announced sugar committed to several of the satellites will be withheld and sold to customers who furnish dollars or pounds sterling,⁵⁸ she has been swept economically within the Soviet Bloc. The "free" sugar market and Cuba with it are firmly within the Soviet economic grip.

F. MACROSEISMIC EFFECTS OF THE QUOTA MANIPULATION

Manipulation of the Cuba sugar quota may or may not have set in motion a chain of events which will end an effective International Sugar Agreement. Nevertheless, the new sugar boycott of its principal foreign supplier clearly confronted the United States with political and economic problems which overshadowed the evanescent political considerations which appeared significant during the 1960 Congressional debates.

By 23 July 1960, the wholesale sugar price in the United States was \$9.70 per hundred pounds. This was the highest price since 1923. The price increase was produced in part by higher shipping costs upon sugar obtained from sources more remote than Cuba and by the lack of a 20% tariff differential upon sugar obtained from these sources. Sugar refineries in the Eastern United States handled unrefined cane sugar only and could not refine beet sugar obtained within the United States without equipment modifications.

To reduce the rising sugar price, the Secretary of Agriculture increased the estimated need in 1960 from 10,000,000 tons to 10,400,000 tons. 61,840 tons of this increase were to be allocated to quota holders and the remainder was allocated to nonquota holders in foreign countries. Unutilized sugar beet acreage was reallocated

⁵⁷ See *New York Times*, 10 January 1962, page 69, col. 1. The proceedings of the Council are secret. The Cuban quota for 1961 had been set at 1,992,375 tons. The Council was prepared to add to this the 3,000,000 tons taken by the United States before 1959, but Cuba demanded that this increase be of the total 4,860,000 tons committed to the Soviet Bloc, or a total free-market quota of 7,285,000 tons. This would leave the previous 1,992,375 tons to be used in a search for new markets and convertible foreign exchange.

⁵⁸ See *New York Times*, 14 February 1962, page 1, col. 4.

to states, such as California, in which producers could make late beet plantings in 1960. In October 1960, domestic restrictions on sugar beet acreage were lifted. Waste everglades land in Florida was rapidly developed by Cuban emigres and others for cane production.

The system of sugar production within the United States was upset by the emergency. Control of production, importation and prices under the Sugar Act of 1948 and related laws had been keyed to the participation of Cuba as a principal foreign supplier. A reduction or elimination of the Cuban sugar quota thus posed the problem of a parallel readjustment in the domestic system for controlling sugar production and imports.⁵⁹

As the logic of the quota system for sugar supply was brought into question, the problem was posed for protection of domestic producers. Their production costs would be higher than those prevailing in the territories of any foreign competitors. Innovations to protect these producers might have repercussions in the farm price support program generally.

The Congress could be expected to consider matters such as these with care and deliberation. While Congress pondered these sensitive issues, the policy of the Administration concerning the Cuban sugar deficit and its by-products would have to be developed both indigenously and piecemeal.

The principal problem in foreign affairs which the President was left to solve concerned the sugar quota of the Dominican Republic. The Council of Foreign Ministers of the Organization of American States voted in August 1960 to condemn Dominican acts of aggression against Venezuela, to break diplomatic relations with the Dominican Republic, and partially to interrupt economic relations with that country. Trade in arms and implements of war was to be suspended entirely. Extension of this embargo to other articles was to be studied by the Council; but no action extending the embargo to items other than arms and implements of war was undertaken at this meeting.

Pursuant to the formula prescribed by Congress in its Amendment of July 1960, to the Sugar Act of 1948, the Dominican Republic was to participate in any reallocation of the Cuban sugar quota. The Secretary of Agriculture estimated that by reduction of the Cuban quota, the Dominican Republic would receive a re-

⁵⁹ At the time of writing (1962), the Administration has prepared a new law for the control of domestic sugar production and sugar imports which, it is understood, drops the quota system, although the details of the law have not been disclosed.

allocation of approximately 322,000 tons over the 34,000 tons which it would have received prior to July 1960.

Because of the advantageous price on the American market, the reallocation was a windfall to members of the Trujillo family, whose members controlled much of the Dominican sugar industry. The United States was in the position, as many felt, of rewarding one dictator while imposing a sanction against another. The Government of Venezuela considered the windfall, while not in violation of the letter of the decision of the Council of Foreign Ministers, not in accordance with the spirit of that decision.

When Congress reconvened in August, following the National Conventions, the President, in addition to requesting an extension of the Sugar Act beyond the deadline of 31 March 1961 with continuing authority to reduce the Cuban quota, also requested authority to reallocate to other foreign suppliers the 322,000 ton quota which, by the Amendment of 1960, would pass to the Dominican Republic.

This threat of economic action against the Dominican Republic, even though its regular quota was not disturbed, proved an obstacle which prevented Congressional action concerning the sugar quota during the remainder of the session. The Congress adjourned without extending the Act beyond the deadline of 31 March 1961 established before its recess.

While it then became necessary for the Secretary of Agriculture to authorize importation of 322,000 tons of Dominican sugar, an entry fee of 2 cents per pound was imposed upon sugar imported under this reallocated quota, the fee being payable in advance. This fee was based upon the provision in the Amendment of 1960, subjecting a reallocated quota "to such terms and conditions as * * * the President * * * deems appropriate under the prevailing circumstances."

The Secretary determined that Dominican sugar in the national interest should be purchased at less than the United States market price.⁶⁰ The part of the Cuban quota allocated to the Dominican Republic consequently brought 3.7 cents per pound as against 5.7 cents per pound which the sugar would have brought without the entry fee. While this price was still .45 cents above the world-market price, the entry fee denied approximately \$12,900,000 to the Dominican Republic.

A somewhat different problem was presented by reallocation of the Cuban quota among other quota and nonquota holders. Quota countries were quick to solicit increases and were resentful of apparent inequities in reallocations by the Administration. Nonquota

⁶⁰ 25 *Federal Register* 9197 (1960).

countries, such as India, seeking substantial allocations, could point with justification to the fact that the supported American price was a form of aid to the foreign supplier.

Reallocation of the Cuban sugar quota thus became entangled in the delicate nuances of foreign aid. An award of part of the Cuban quota created a vested interest in the recipient. If Castro fell, the Cuban quota might be restored. The tendency of the recipient thus might be to support Castro to insure the breach between the United States and Cuba continued. If the reallocation proved temporary, the United States would have encouraged the foreign supplier to increase acreage to meet the new demand. This would leave it with an unmanageable surplus when the quota was restored. The Soviet Union, the major sugar producer, could then wreck the internal economy of the overexpanded sugar producer by disturbances of the free sugar market.

G. THE DEFENSIVE PHASE OF ECONOMIC ACTION AGAINST CUBA: AN INTERIM JUDGMENT AND DEMONSTRATED NEED

Sufficient time has not elapsed to permit an adequate appraisal of the economic measures developed by the United States against Cuba in the "sugar encounter." During 1961 Congress extended the Sugar Act until 30 June 1962 and authorized the President to exclude from reallocations any country with which the United States did not maintain diplomatic relations. Under this authority the Cuban sugar quota was entirely eliminated.⁶¹

The Punta del Este Conference in 1962 voted to interrupt the traffic and trade in arms between Cuba and other countries in the Hemisphere. The Council of the Organization of American States was directed to consider the extension of this embargo and boycott to other items, with special attention to those of a strategic nature, although recommendations concerning such matters must now come from the Council.

A boycott upon shipments of goods into the United States of Cuban origin and goods imposed from or through Cuba was imposed by the President in February 1962.⁶² Action may be taken to have

⁶¹ 75 Stat. 40 (1961).

⁶² 25 *Federal Register* 1085 (1962). Reliance was placed upon Section 620(a) of the Foreign Assistance Act of 1961, 75 Stat. 445, which authorizes the President to maintain a total embargo on all trade between Cuba and the United States. The term "boycott" is used in the text as a more accurate description of the effect of the President's proclamation, an embargo already existing on the outflow of trade from the United States to Cuba.

the Coordinating Committee of the Consultative Group apply its International List and trade restrictive techniques to Cuba.⁶³ The effects of these and other measures which may be adopted must be assessed in the future.

At the present time the most sanguine tentative appraisal of these measures suggests only that time was bought within which Latin American action might be mobilized to contain the Castro-Communist revolution by accelerating the drift of Cuba into the Soviet grip. Whether this will work ultimately to the political advantage or disadvantage of the United States will depend upon the effectiveness with which the purchased time is utilized.

Economic pressure upon Cuba frustrated for the time being an extension of the Castro Revolution to other parts of Latin America. Loss of dollars derived from premium sales of sugar in the United States created unemployment in Cuba. The embargo of 1960 and its subsequent extension in 1962 have created serious shortages in food and hardware. Although assistance from the Soviet Bloc might ultimately compensate for these deprivations, the Castro regime was, in the interim, forced to concentrate its attention upon internal problems and could devote only a small part of its time and even less of its resources to exportation of its political, social and economic doctrines.

Manipulation of the quota created a Cuban emergency. Delay in the manipulation, coupled with the excitement and surge of patriotism which the quota withdrawal created in Cuba, enabled Castro to purge his moderate followers without embarrassing explanations to the Cuban public of the facts behind the ousters. Redirection of Cuban trade was forced at a time when only the Soviet Bloc had both the capacity for absorbing it quickly and the political motive for soliciting actively Cuban requests for markets and economic assistance.

⁶³ A suggestion of the outline of probable future action may be found in the testimony of Secretary of State Rusk appearing in *Investigation and Study of the Administration, Operation and Enforcement of the Export Control Act of 1949 and Related Acts, Part II* (Hearings Before the Select Committee on Export Control, House of Representatives, 87th Cong., 2nd Sess. Doc. 77836, 1962) 606-610; 615-620; 625; 626.

PART II

THE NAVAL PARTICIPANT IN ECONOMIC WARFARE

CHAPTER III

ECONOMIC IMPACT OF INTERNAL CONFLICT

INTRODUCTION

This Chapter deals with economic warfare in the early phases of an insurgency. The function of the United States Navy in this context is primarily one of protecting the lives and property of United States citizens. Their property may be jeopardized by economic warfare practiced either by the insurgents or by the *de jure* government of the state divided by internal conflict. The economic warfare posture of the United States is basically that of a third party, parrying the economic warfare thrusts of contestants in civil strife. Four Situations are presented.

Situation 1 deals with the critical intelligence problem in economic warfare and the special role in fact gathering to be performed by naval surface units. Considered here are alternatives for obtaining intelligence, port control by the territorial sovereign and special legal problems associated with visits to foreign ports and approaches by naval units to foreign coasts and blockading squadrons. A description of the Organization of American States, the origins of the Organization and its functions, appears in Footnote 25.

Situation 2 develops distinctions between "closure" of an insurgent port and "blockade." Rights of the *de jure* government and the insurgents to visit, search, and seize vessels of "bystander" states in territorial waters of the divided state are considered.

In *Situation 3* legal problems are examined pertinent to armed landings to protect lives and property when the local government either cannot or will not extend this protection. The diverse definitions and opinions concerning "intervention" in international law are examined principally here, although in *Situation 1* the "intervention" problem is introduced with major emphasis upon the views of Western Hemispheric states.

Because "intervention" claims are frequently advanced in response

to economic warfare, "intervention" receives distributive treatment in this book. The varying perspectives concerning intervention are best grasped by relating the sundry definitions to concrete cases. However, the discussion in *Situation 3* is intended to provide a general background for the discussions in situations that follow. "Self-Defense" and "Collective Self-Defense" arguments are dealt with in detail in Chapter IV, *Situation 6*.

The narrow but complex and important problems of requisitions and contributions during insurgency are considered in *Situation 4*. Since few treaties or conventions dealing with requisitions or contributions apply specifically to these practices during insurgencies before recognition of a state of belligerency, naval officers have solved these problems for generations by the application of good judgment and "common sense" coupled with minor applications of force when required. The Discussion suggests legal arguments which might be advanced should the occasion demand it.

A. NAVAL RECONNAISSANCE IN CIVIL DISTURBANCE

Situation 1

The Partido Democratico Secreto (PDS) led by Salvaje, is declared illegal in Nueva (see map) by the constitutionally elected and generally recognized government of President Cortez. Desultory fighting has occurred between Cortez and PDS forces in *Exaltacion*.

Our Charge d'Affaires in *Dolores*, the Nuevan capital, reports our Consul from *Exaltacion* is in *Dolores* and has not been permitted to return by Cortez troops. Wire communications between *Dolores* and *Exaltacion* are broken. There is no radio contact between our Ministry and the Consulate. No other diplomatic missions in *Dolores* have contact with their consulates in *Exaltacion*. The Nuevan Foreign Office states Cortez has received a message in which Salvaje threatens to destroy the lumberyards in *Exaltacion* unless Cortez troops are withdrawn, the PDS reinstated, and Salvaje is taken into the Cortez government as Premier. Our Charge d'Affaires believes Cortez will reject these terms.

A Buick dealer who drove from *Exaltacion* to *Dolores* reports three Cortez soldiers have been killed and ten United States citizens have taken refuge in the Consulate. He also reports rumors in *Exaltacion* that officers and crews of *Almirante Medina* and *Almirante Sidonia*, Nuevan destroyers, anchored in *Exaltacion* harbor, have defected. These are the major combat units of the Nuevan Navy.

Early this morning, Cortez declared all communications, except



diplomatic dispatches, to and from Nueva, blocked effective immediately. He also declared a "blockade" of *Exaltacion*.

The lumberyards in *Exaltacion* are owned by the Virginia Pine Products Corporation, a Virginia Corporation, and Union Box and Bagging Company, an Illinois Corporation. These are not guaranteed investments under the Act for International Development of 1961.

The lumber presently stored or seasoning in the yards is valued at \$35,000,000.00. The owners intend to sell this lumber in the United States.

U.S.S. *Montgomery* (cruiser), U.S.S. *Staton* (destroyer) and U.S.S. *Parsons* (destroyer) are at sea and can reach *Exaltacion* within three hours. The 5th Battalion, 6th Marine Division, with airlift capability, is at Coloso, Antioka, and can reach *Exaltacion* within five hours.

Nueva and Antioka are members of the United Nations and of the Organization of American States. They are parties to the Rio Pact.

Our Secretary of State and our Minister to *Nueva* (on leave in the United States) are in conference. Both are inclined to the view that a naval unit should be sent to *Exaltacion*. This unit will determine effectiveness of the "blockade" declared by Cortez, the strength of the revolt by the PDS, and Salvaje's willingness and ability to protect American citizens and their property in *Exaltacion*.

You have been given the situation by telephone and are to be at the State Department at 1400 (within approximately one hour) to assist the Secretary and Minister in preparing a recommendation to the President. What "legal" questions should you raise for consideration at the conference?

Discussion: Situation 1

Tentative Factual Analysis

The revolt is ill organized and uncoordinated and probably prematurely induced. Salvaje has turned to economic warfare as a primary policy device by threatening to sabotage a major product held for export. There is no basis for a judgment concerning his immediate or ultimate plans.

However, plausible assumptions may be made about his threat to destroy the property. (1) He probably seeks to gain time to attract foreign support and acquire equipment. (2) He wishes to publicize repressive action by the Cortez government. To do this he is creating a situation which might be presented to an international security

organization. (3) He may intend to weaken the Cortez government by: (a) destroying a product which, if sold, will bring dollars into the country; and (b) demonstrating its inability to protect the property of foreign nationals.

The revolt is in a critical stage. It might be quickly crushed or spread rapidly depending upon the attitudes of other states.

Necessity for Information

The United States needs immediate information concerning the strength and intentions of the Cortez and Salvaje factions. Information concerning the Cortez forces can be obtained from our Charge d'Affaires in *Dolores* through the usual diplomatic channels. But *Exaltacion* has been cut off by land. Wire and radio communications with it have been broken.

Military action may be necessary to protect the lives and property of our citizens in *Exaltacion*. This action should not be taken unless a real peril to lives and property of American citizens is discovered. Action then should be taken only if the Cortez or Salvaje factions are either incapable of discharging or are unwilling to discharge the international obligation of Nueva to protect aliens and their property. The necessity, timing and scope of possible military action necessitates developing a reliable intelligence source in *Exaltacion*.

Establishing an Intelligence Source

An intelligence source would be created preferably by persuading President Cortez to allow our Consul to return to his post and from there communicate with the Ministry in *Dolores*. An argument for free access of the Consul to *Exaltacion* may be based upon a treaty of friendship and commerce between Nueva and the United States. An argument may also be based upon the customary international law of diplomatic immunities. We might rely upon this customary law to insist upon free movement of our diplomatic personnel between *Dolores* and *Exaltacion* and communication by wire or radio between our Ministry and the Consulate.

Such arguments are likely to carry little weight while the emergency is acute. The Cortez government will attempt to isolate the rebels from all external communication and possible assistance.

Since the insurgents will try to establish outside contacts, it may be possible to wait until this happens. In the interim, American lives may be lost or property destroyed. These things might be prevented by prompt action.

Clandestine agents may be infiltrated into *Exaltacion* or contact may be made with clandestine agents already there.

A communications team may be airlifted to *Exaltacion* to establish a communications base. But such a team is difficult to protect and control. An incident might result precipitating premature United States action.

The most reasonable alternative is to dispatch a United States naval unit to *Exaltacion*. The unit should possess sufficient force for its protection. Its presence will provide a bargaining element in negotiations with Cortez to permit return of the Consul and re-opening communications. It will deter interference by disloyal Nuevan naval units in the event airborne landings in *Exaltacion* are necessary and provide the fire support such landings may require.

Control by a Territorial Sovereign Over Entry of Foreign Warships

The territorial sovereign (in this situation the Cortez government) is entitled to close a port; designate times when entries may be made and the time of sojourn; and require the departure on short notice of either a merchant or war vessel. There is no right of innocent anchorage analogous to the right of innocent passage through territorial waters. The United States has taken the position that it may require withdrawal of a foreign vessel of war from one of its ports within six hours even before expiration of the previously agreed time of sojourn.¹

There is no minimum time limit for requiring a departure, subject to delays necessary to refuel, assemble the crew, and obtain a pilot and tug. The time should be determined by the type and condition of the vessel, its preparedness to put to sea, and conditions in the port.

A warship, today, poses less of a threat as a base for shore bombardment while in port than when at sea. But these vessels, and merchant vessels as well, may serve as vehicles for prepositioned nuclear explosives, missile guidance devices, radar jamming equipment and biological warfare munitions. These hazards justify summary and decisive action. The port control laws of all major states provide administrative machinery for port closures.²

This potential control over its ports is nevertheless seldom exercised by a littoral state except during warfare or under special circumstances such as those prevailing in the Panama Canal Zone

¹ A discussion of the problem appears in *U.S. Naval War College, International Law Topics and Discussions, 1914*, 35-67.

² The power of the President to control United States ports is set forth in 50 U.S. Code 191 and the regulations of the Coast Guard pursuant to this authority appear in 33 CFR 6.01-1 *et seq.*

or in nuclear testing areas.³ Active patrols at sea are likely to detect suspected vessels. These can be prevented from entering a port.

Accordingly, the only situation in which significant conflict develops concerning the visit of a warship to a foreign port is during civil strife, as in Nueva, when the visit is to a port under possible rebel control and *de facto* control of the port by the *de jure* government is questionable. This problem is explored in greater detail in *Situation 2*. However, it is in the incipient stages of an insurgency that an information "blackout" is likely to occur. If a naval reconnaissance is undertaken, adequate attention must be given to avoiding an issue of authority of the *de jure* government over the port.

While it is customary to obtain consent of the territorial sovereign prior to a call by a naval unit at a port within its territory,⁴ there is no international legal requirement that consent be obtained in advance of the visit.

If consent by the Cortez government was sought by the United States in advance, the Cortez government might assent to the visit. The assent might be granted on the ground the presence of an American warship would be viewed as a gesture of moral support for the regime. Presence of an American warship might also influence the loyalty of the officers and crews of Nuevan vessels at *Exaltacion* in favor of the *de jure* government. Information of the rebel plans might be obtained from the American intelligence efforts.

On the other hand, Cortez has declared a "blockade" of *Exaltacion*. It is well settled that a foreign warship has no right to pass an effective blockade. Such a vessel may be allowed ingress and egress subject to conditions imposed by the blockade commander.⁵

While it remains to be determined whether the "blockade" declared by Cortez *is* a blockade and *is* effective, his declaration may indicate his intention to forbid entry to the port.

It is undesirable to present at this stage of the insurgency the issue of control by the Cortez government over *Exaltacion*. Cortez might be placed in a position in which he would be obligated, for

³ The regulations for the Canal Zone and the Nuclear testing areas in the Pacific are established by the Governor of the Canal Zone and the Department of the Navy respectively, pursuant to power delegated by the President under 50 U.S. Code 191.

⁴ I Hyde, *International Law*, 583 (1947); II Hackworth, *Digest*, 408 (1941). The procedure is not followed when a warship is driven into port by weather or unseaworthiness. Ports open to merchant vessels are open to warships.

⁵ These conditions normally will exclude the carriage of passengers, supplies and dispatches. See II Moore, *Digest*, 571 (1906).

the sake of consistency, to withhold consent. It is desirable to avoid also the issue of "intervention" which might be raised if the reconnaissance should be made in defiance of the wishes of the Cortez regime.

It is arguable that the purpose of the visit, which extends beyond a mere courtesy call, places a special obligation upon the United States to secure the permission of a government which may still be in effective control of a port. But international custom upon which such an argument might be based is slight.

*United States Position Concerning Advance
Consent to a Naval Reconnaissance*

In 1901, Venezuela protested the entry of U.S.S. *Scorpion* into the "closed" port of Santa Catalina. The Venezuelan note alleged:⁶

An officer in uniform went ashore * * * and returned on board accompanied by a gentleman called Boynton, an employee of the company which has its agency at said port, and * * * no explanation was given for this flagrant violation of the usual formalities.

Santa Catalina is on the Orinoco River. A Venezuelan law required governmental consent for a foreign warship to enter closed ports on "scientific" missions.

United States Minister Loomis replied in part:⁷

* * * I was not aware that there was a law in force closing the Orinoco River to the public vessels of a friendly nation bent on the peaceful and inoffensive mission of seeking information from its nationals engaged in lawful business on the banks of that stream.

It is true that when it was desired to do certain scientific work for the benefit of navigation and the shipping of all nations at the banks of the Orinoco and San Juan rivers, the formal permission of the Venezuelan Government was asked; but in these cases it was deemed necessary to keep a war vessel in Venezuelan waters for many weeks, and the officers and men on these scientific expeditions were at work in small boats taking many observations and measurements, so it was only natural that their presence for so long a period of time and their activity should be explained in the form of asking permission for the performance of the task in question.

The *Scorpion*, as I understand it, recently made a very quick trip to Santa Catalina and immediately returned to the coast.

⁶ *Ibid.*, 566.

⁷ *Ibid.*

Her visit was of course wholly inoffensive in character and devoid of significance in any other sense than the one I have the honor to indicate, and, as your excellency knows, there are precedents for the informal visits on the part of war vessels of a friendly nation. * * *

Secretary of the Navy Long's memorandum in relation to the visit of *Scorpion* states:⁸

In the practice of this Department there is a distinct and well recognized difference between the visit of a man-of-war and a visit for 'scientific purposes,' such scientific purposes being usually hydrographic and occasionally topographic examination of territorial waters or shores of a foreign country.

The Department would ordinarily not order one of its vessels to any port of any country having a recognized government to conduct surveys or examinations, without having first not only notified that government of its wish, but having obtained explicit permission for conducting the survey upon the occasion of the visit.

On the other hand, it would neither send notice nor request permission in case the visit was not undertaken for the purpose of conducting such survey or other similar purpose, unless the waters proposed to be visited were expressly denied to passage of men-of-war by national decree, as in the case of the Amazon.

In 1895, American missionaries apprehended massacres in Marash, Hadjin, Orfa and other cities under Turkish control. U.S.S. *Marblehead* was ordered to the Gulf of Alexandretta to find the facts. Secretary of State Olney replied in response to an inquiry by the Turkish Minister that the visit was:⁹

* * * in pursuance of a long established usage of the government to send its vessels, in its discretion, to the ports of any country which may for the time being suffer perturbation of public order and where its countrymen are known to possess interests. This course is very general with all other governments, and the circumstances that a transient occasion for such visits may exist does not detract from their essentially friendly character. * * *

*Naval Armed Reconnaissance in
Civil Disturbance As "Intervention"*

A United States naval vessel in the port of *Exaltacion* will affect the insurgency. Contact of an informal nature with Salvaje may be

⁸ *Ibid.*, 570.

⁹ *Ibid.*, VI 342.

necessary to obtain information. The visit may be taken by others either as an effort to overawe the insurgents or as a gesture in their support.

These effects will be characteristic by-products of a naval reconnaissance during civil strife. They may furnish for this reason the basis of a charge of "intervention" in the domestic or foreign affairs of the state concerned.

The problem has been discussed as one of "offensive" intelligence gathering or "espionage." The unmentioned but effective by-products of the visit usually are the injuries provoking the charge of "intervention."

In the *Corfu Channel Case*,¹⁰ for example, two British destroyers were damaged by underwater explosions. These explosions were believed by the British to have been produced by mines moored in Albanian territorial waters in the Corfu Channel.

The United Kingdom announced its intention to sweep the channel. The International Mine Clearance Board decided to order a sweep if Albania consented.

Albania withheld its consent. But the United Kingdom nevertheless swept the channel, protecting its minesweepers by a large covering force.

Thereafter, before the World Court, the United Kingdom argued in part that the sweep was justifiable because it was executed to obtain evidence to facilitate the task of the Court. The Court rejected this argument, stating:¹¹

* * * The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself. * * *

The evidence obtained in the sweep was a vital part of the British

¹⁰ International Court of Justice, *The Corfu Channel Case (Merits)*, Judgment of April 9th, 1949, I. C. J. Rep. 4 (1949).

¹¹ *Ibid.*, 35.

case. The Court did not hesitate to consider the evidence in its decision in favor of the United Kingdom.¹²

The language of the Court concerning the propriety of an intervention by a naval force in the territorial waters of another state in order to obtain the evidence necessary to support a claim against the latter is in response to the case presented by Albania. Yet the injuries to Albania were not considered explicitly. Apart from injury to Albanian pride and dignity, there were two major injuries. First was the adverse effect of the naval demonstrations upon the concomitant Albanian boundary dispute with Greece. The second was the disturbing effect upon the internal order of Albania where the Hoxha government was not then firmly entrenched.¹³

Whatever the intention of the United Kingdom may have been concerning the Albanian-Greek dispute or the stability of the Hoxha government, it clearly needed a passage through the channel and evidence to support its claim for damaged vessels and loss of life. Under the circumstances in the Corfu Channel area in 1949 these by-products probably could not have been avoided. Avoiding similar by-products, however, is a major task in a naval reconnaissance during civil strife if an intervention argument is to be denied an existing or prospective adversary.

During a naval reconnaissance the factual matrix is amenable to management in a marked degree. Reliance may be placed upon past acceptance of nonhostile naval visits to avoid intervention arguments.

Doctrine of "Intervention"—Preliminary Discussion—Background

But what foundation for an "intervention" argument might be provided by a naval reconnaissance assuming the most adverse circumstances? Difficulty stems from varied and conflicting defini-

¹² A summary of difficulties of the old "Permanent" Court and the present World Court in finding facts in cases before them and suggestions for reform appear in Alford, "Fact Finding by the World Court," 4 *Villanova Law Review*, 37 (1958). These difficulties have been shared by other international organizations. The United Nations Special Committee formed to investigate the alleged intervention of the Soviet Union in Hungary was not allowed to enter Hungary and based its report on information obtained without direct observation. *U.N. Doc. GA/3592*, 11th Sess., Supp. No. 18.

¹³ For opposing views concerning seizure of the evidence, see Nasim Hasan Shah, "Discovery by Intervention: The Right of a State to Seize Evidence Located Within the Territory of the Respondent State," 55 *A.J.I.L.*, 595 (1959); Fitzmaurice, "The Law and Procedure of the International Court: General Principles and Substantive Law," 27 *Brit. Y.B. Int. L.*, 5 (1950).

tions of "intervention" by publicists and the unwillingness of some to experiment with definitions.

In the Discussion of *Situation 3* in this Chapter, the difficulties in a definition of "intervention" and the shortcomings of the prevailing definition based on "coercive impact" will be explored. A test for intervention geared to administrative requirements in regulating coercion will be suggested.

It should be observed at this point, however, that by none of the usual treatments of "intervention" would a naval reconnaissance be impermissible. While all intercourse between states has some impact in the territories of the states involved, stretching the concept of intervention to cover all impact would stretch the concept to the breaking point. Indeed, it has been observed that the rule of law in international affairs depends upon "intervention" for its support. "Non intervention," like "sovereignty," should not be taken as an absolute.¹⁴

The usual definitions of "intervention" stress "method," "purpose" and "impact." Oppenheim defines intervention as "* * * dictatorial interference of a State in the affairs of another State for the purpose of maintaining or altering the condition of things."¹⁵ Hyde concentrates upon the effects of the action, describing intervention as "* * * interference of a State in the affairs of another State in opposition to its will and serving by design or implication to impair its political independence."¹⁶

Elements of both definitions are combined by Thomas and Thomas. These authors describe intervention as occurring "when a state or group of states interferes, in order to impose its will in the internal or external affairs of another state, sovereign and independent, with which peaceful relations exist and without its consent, for the purpose of maintaining or altering the condition of things."¹⁷ Thomas and Thomas emphasize:¹⁸

* * * A fact of importance which is often forgotten is that there must be in the influence a factor to force compliance with the will of the interfering state. The interference must take place as action or inaction or threats thereof of an adverse nature or are thought to be adverse in case the state should fail to conform to the will of the intervening state.

¹⁴ Fenwick, "Intervention and the Inter-American Rule of Law," 53 *A.J.I.L.*, 873 (1959).

¹⁵ I Oppenheim, *International Law*, 305 (8th Ed., 1955).

¹⁶ I Hyde, *International Law*, 246 (1947).

¹⁷ Thomas and Thomas, *Non-Intervention*, 71 (1956).

¹⁸ *Ibid.*, 72.

By the Oppenheim or Hyde definitions, or the more precise definition by Thomas and Thomas, a mere reconnaissance by a naval vessel to determine the facts in a civil disturbance is not a delict. There is no "dictatorial" interference nor is there an intention to alter or maintain local political conditions.

It is possible that information so acquired may prove the basis for a decision to take military action to preserve United States lives and property when local authorities are unable or unwilling to discharge an international responsibility to do so. But the political "independence" of the state concerned cannot be said to be materially affected by the action if limited to these ends. There is no "coercive" element either in obtaining the information or in using it.

Publicists have deduced from the doctrine of "independence" of a state in international law an implied prohibition upon the projection of the power of one state into the territory of another. Since states exist in an environment in which their peoples are interdependent for values, and the decisions of officials in one state for this reason normally have some impact in the territory of another, these scholars appear to view all interstate impacts as presumptively interventions of a "delictual" nature. However, they seek to establish permissive areas of intervention—such as "normal commercial diplomatic intercourse," "self-defense," "reprisal" or "exercise of a treaty right."

This approach tends to accept state protests as an index of the offensive nature of a specific action. But these protests have been made when there is no offensive impact of a serious nature and often recite objections other than the real complaint.

Within recent years protests made either for "diplomatic spying" or for the espionage activities of amateurs, combining gathering of political and economic intelligence with study, business or travel, have been highly publicized. These protests are intended to plug inadvertent leaks in government communications channels, rally support to the government by dramatizing a foreign menace, or create bargaining advantages.

Robert A. Vogeler, for example, was convicted of espionage and sabotage in Hungary in 1950. He was released in exchange for a United States agreement to reopen Hungarian consular offices in New York and Cleveland, validate passports of American citizens for Hungary and deliver Hungarian goods held in the United States Zone of Germany.¹⁹

Protests concerning espionage should not be taken as expressing

¹⁹ 24 *Department of State Bulletin*, 723 (1951); *New York Times*, 29 April 1951.

a consensus that espionage or other covert or overt intelligence efforts are "interventions" in violation of international law. While espionage is a crime by the laws of all states, it has never been considered clearly an immoral act unless involving an element of treason. Espionage, of course, may be associated with acts, such as sabotage, that are considered interventions. Espionage may be so intertwined with the illegal act that it cannot be separated from it.

A special method of espionage or reconnaissance may be condemned as an "intervention." There is general agreement, for instance, that invading the territorial airspace of a state, covertly or overtly, without its consent is an international delict.²⁰ Any incursion into the territorial airspace is delictual whether the mission of the aircraft is carry and drop a bomb, introduce saboteurs, or photograph the terrain.

Differences in treatment may be accorded the aircraft, its pilot and passengers depending upon its mission and the circumstances under which it intrudes.²¹ Yet the mere aerial intrusion is regarded as a delict irrespective of the mission.

Espionage by the pilot, such as that by Pilot Powers in his U-2 mission, may enhance the offense. But the *method* of espionage is the serious feature which is likely to result in its characterization as an international legal delict.

There is a "legal" advantage in reconnaissance by a naval surface vessel. The *method* of reconnaissance or espionage, depending upon the overt or covert nature of the operation, is one that has been accepted for many years and to which the rights and obligations of states in an insurgency have been geared.

Air surveillance may produce information bearing upon the degree of military investment of *Exaltacion* but can contribute little concerning the intentions of the insurgents or the attitude of the population. Air surveillance may be interrupted by bad weather. It is difficult to maintain for long periods of time, and presents the hazard of incidents through failure of the competing factions to identify the aircraft.

Surface vessels are easily identified. Their right of approach to determine the effectiveness of a blockade is clearly settled.

As stated by Secretary of State Van Buren in 1831:²²

It is not inconsistent with the principles of international law for a neutral sovereign to send an armed cruiser to watch a

²⁰ See Wright, "Legal Aspects of the U-2 Incident," 54 *A.J.I.L.*, 836 (1960).

²¹ See Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law," 47 *A.J.I.L.*, 559 (1953).

²² VII Moore, *Digest*, 790 (1906).

blockaded coast, so as to see no injustice is done to his own merchant vessels, and that they may be prevented from any irregular proceedings.

There may be special circumstances, such as the Albanian-Greek dispute or the amount of force employed in the *Corfu Channel Case*, placing the method of naval surface surveillance in an unfavorable perspective. The commander must take care that his action is limited to reconnaissance and that gestures of support for either side are avoided.

Thus, Captain Voorhees was dispatched in the frigate *Congress*, in 1844, to Montevideo to observe and protect American interests during a civil contest in Uruguay. Montevideo was then besieged by General Oribe and was blockaded by cooperating vessels of the Argentine Confederation.

Sancala, an armed schooner of the Oribe faction, pursuing a fishing boat supplying the besieged forces, accidentally fired upon an American merchantman and then took refuge with the Argentine fleet.

When Captain Voorhees learned of this, he captured *Sancala* and followed up this success by capturing the Argentine blockaders. His action was disavowed by the United States. Captain Voorhees was court-martialed and convicted of disobedience of orders, having been enjoined by Commodore Turner to "maintain a strict and unqualified neutrality in all things."

His letter of reprimand by Secretary Bancroft and the findings and sentence of the Court were transmitted to the Argentine Minister "with an expression of the hope that his Government would see in it a satisfactory proof of the disposition of the United States 'to respect the rights of Buenos Aires'."²³

"Intervention" Defined by International Agreements

There is nothing in the treaties or conventions to which the United States and Nueva are parties prohibiting a naval reconnaissance of the type contemplated. This assumes the reconnaissance will be conducted with adequate care to avoid foundation for a charge of "intervention" based upon customary international law.

Article 2, paragraph 2 of the United Nations Charter, upon which many publicists have relied to urge a "conventional" nonintervention rule apart from customary international law, requires members to refrain from the threat or use of force against the *territorial integrity* or political independence of any state "or in any way inconsistent with the purposes of the United Nations."

²³ *Ibid.*, I 182.

Force is neither threatened nor necessarily used in an armed reconnaissance. The threat or use of force is likely to frustrate the purpose of the mission. There is no attack upon the territorial integrity or the political independence of the state concerned. The reconnaissance is designed to explore the existing conditions and provide a basis for evaluation of their possible future trend.

One of the major purposes of the United Nations is to function as a center for the exchange of information upon which the international legal rights and responsibilities of states are based. Securing this information by a naval reconnaissance without hostile intent supports rather than impedes this function.

Most relevant "nonintervention" doctrine in treaty form with which the United States and Nueva might be concerned has developed within the Inter-American system. Western Hemispheric nations have maintained continuing pressure upon the United States to accept by treaty a limitation of "nonintervention" in its relations with them.

At the Third International Conference of American States in 1906, a convention was signed creating an International Commission of Jurists which was to prepare a codification of international law applicable to the American Republics. The Third Committee of this Commission considered in 1913 a rudimentary nonintervention doctrine. This was, simply, that the only kinds of conduct in the affairs of a state, exercisable by another without intervention or "imposition," were "good offices" and "mediation."

The Commission, however, in 1928 recommended for consideration by the Sixth Conference of American States the more general formula: "No state has a right to interfere in the internal affairs of another." While this statement was sufficiently flexible to be construed by a foreign secretary substantially as he desired, the provision failed to be adopted by the Conference largely because of the opposition of the United States.

The United States position was altered in the Franklin Roosevelt Administration. The United States accepted at the Seventh Conference the formula rejected in 1928, with the further inclusion of "external affairs" as a prohibited area of intervention. The United States reserved its rights "as generally recognized by international law." But even this reservation was dropped in the Additional Protocol Relative to Non-Intervention signed at Buenos Aires in 1936. In this Protocol, the contracting parties declared inadmissible:²⁴

²⁴ 51 Stat. 41 (1937).

* * * the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the parties.

A violation of the provision was to: “* * * give rise to mutual consultation, with the object of exchanging views and seeking methods of peaceful adjustment.”

Following World War II, the United States accepted the sweeping statements of intervention, keyed to coercion, which appear in the Charter of the Organization of American States.²⁵ Article 15

²⁵ 2 *U.S. Treaties* 2394. Often called the “Bogota Charter,” the pact was signed in 1948 and entered into force for the United States in 1951. The Organization of American States has roots in the Congress of Panama called by Simon Bolivar in 1826. It began to assume its current form in the International Union of American Republics. This was later renamed the International Bureau of American Republics, and still later renamed the Pan American Union, in a series of Inter-American Conferences between 1889 and 1910.

The Pan American Union became an information and secretarial center and a focal point for many conferences, commissions and technical organizations functioning in the Inter-American field. The Organization of American States continues the Pan American Union and gives formal status to a number of its activities.

In addition to the Pan American Union, the permanent bodies are the Council (formerly the governing board of the International Bureau of American Republics, the predecessor of the Pan American Union) and the Specialized Organizations.

The Council is the permanent executive body and a provisional organ of consultation. It has three dependent organs: (1) The Inter-American Economic and Social Council; (2) The Inter-American Council of Jurists with a permanent Inter-American Juridical Committee; and (3) The Inter-American Cultural Council.

The Specialized Organizations are six intergovernmental organizations established by multilateral agreement having functions in technical areas. These are: (1) Pan-American Sanitary Organization; (2) Pan American Institute of Geography and History; (3) American International Institute for the Protection of Childhood; (4) Inter-American Commission of Women; (5) Inter-American Indian Institute; (6) Inter-American Institute of Agricultural Sciences. The Pan American Union is the general secretariat of the Organization.

In addition to these permanent bodies there are three regularly organized assemblies. These are: (1) The Inter-American Conference; (2) Meeting of Consultation of Ministers of Foreign Affairs; and (3) Specialized Conferences.

The Inter-American Conference is the supreme authority of the OAS. It determines general policy, institutional reform and other matters. The Inter-American Conference meets every five years.

The Meeting of Consultation of Foreign Ministers is an emergency assembly to consider questions of urgent importance. The Meeting may be called at the request of any member state, unless an armed attack occurs upon one of the American States. In this case a meeting must be called immediately by the

of the Charter reaffirms the provisions of the 1936 Protocol. But added to these provisions are restrictions upon interventions by groups of states, prohibiting the use of armed forces, and a provision covering:

* * * any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

Article 16 forbids a state to:

* * * use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state and obtain from it advantages of any kind.

Article 17 provides:

The territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another state, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

Articles 18 and 19 key the application of Articles 15 through 17 to existing treaties, including the Rio Treaty. Article 18 binds the American states in their international relations “* * * not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.” Article 19 makes clear that measures adopted to maintain peace and security in accordance with existing treaties do not violate the principles set forth in “Articles 15 and 17.”

It would appear, however, that the reservation in Article 19 must be construed to extend to Article 16 as well as to Articles 15 and 17, expressly stated, since Article 16 is a specific statement of the general principle expressed in Article 15. Article 16 is limited

Chairman of the Council of the OAS. The Meeting of Consultation is frequently referred to as “the Organ.”

An Inter-American Peace Committee performs a “watch-dog function” and suggests measures and steps toward settlement of a dispute.

The Inter-American Defense Board is the military planning agency for the collective defense of the Western Hemisphere. An Advisory Defense Committee, made up of military authorities from the various states, advises the Meeting of Consultation or the Council in case of sudden aggression.

It should be observed that, unlike the United Nations Organization and the Regional Defense Organizations, the Inter-American system is made up of a large number of Inter-American agreements with the OAS Charter as the keystone. The security system, for example, is based upon the Rio Treaty, 62 Stat. 1681 (1948). Most American States are members of the Organization except Canada, the newly independent Caribbean States, Guyana, and the British, French and Dutch dependencies.

to coercive measures, while Article 15 seems broad enough to embrace coercive measures as well as noncoercive measures. An exception applicable to the broader prohibition should embrace the included narrower prohibition.

Despite these comprehensive efforts to deal with intervention by treaty, there has been no meeting of the minds among representatives of the Hemispheric states concerning the acts or the attending circumstances which give rise to an intervention. The Latin American tendency has been to think of intervention or "nonintervention" as an absolute. The United States position has been to regard intervention as an act of coercive effect and to avoid any effort to develop an exact definition of the concept. This might set bounds to its future action to repel intervention in Hemispheric affairs by non-Hemispheric states.

At the Meeting of Foreign Ministers at Santiago in 1959, the Council of the Organization of American States was called upon to prepare a document listing the greatest possible number of cases constituting violations of the principle of nonintervention.²⁶ This was referred by the Council to the Inter-American Juridical Committee. This Committee, while not returning an exclusive list of interventions, set forth a number of cases upon which there was agreement among the Latin American members.²⁷ The American member dissented and rendered a separate opinion.²⁸

The majority of the Committee restated in substance Articles 15 and 16 of the Charter and set forth situations considered illegal "interventions." These included supply of arms; training military expeditions; financial support of military enterprises; political acts affecting the form or type of government; interferences in the administration of justice; use of duress to obtain advantages; and abusive use of recognition. Interventions in the internal politics and administration of a state appeared especially obnoxious. Fomenting of revolutions was particularly condemned.

The report of the Inter-American Juridical Committee and other

²⁶ Pan American Union, Inter-American Juridical Committee, *Instrument Relating to Violations of the Principle of Non-Intervention*, 1 (1959).

²⁷ Seven Latin American states were represented on the Committee.

²⁸ *Op. cit.*, 19. Dr. Murdock, the American member, stated in his dissent: "The reasons for opposing an attempt to define intervention are that, like aggression, it is not the type of concept that is susceptible of definition. To attempt definition by a casuistic list of so-called cases is impracticable, illusory and misleading. Definition is not in the interest of peace, but rather in the interest of promoting intervention. It will impede the realistic development of international law and the statesmanlike constitutional interpretation of the Charter of the Organization of American States by its appropriate organs. * * *"

efforts to dispel the confusion surrounding the intervention concept in the Americas,²⁹ are likely to have little immediate impact in interstate practice so long as "intervention" has primarily political and only secondarily legal significance. There nevertheless seems little doubt that a simple naval reconnaissance, in view of the trend towards emphasizing the coercive element in intervention, will be accepted as legal under Inter-American treaties and conventions.

Article 17 of the Charter of the Organization of American States, prohibiting violation of the territory of a state by temporary military occupation or by "other measures of force" is the provision upon which a possible argument of intervention would most likely be based. This provision should be read as a whole with its last sentence—"no territorial acquisitions or special advantage obtained either through force or by other means of coercion shall be recognized."

When so read the occupation or exertion of force prohibited appears to be one intended to produce a value dislocation in the state concerned and not a temporary occupation disguised as a naval visit to an area suffering from a civil disturbance in order to obtain information. This is so even though the visit produces a degree of value dislocation as an unintended by-product.

Suggested Solution: Situation 1

No prior request should be made to the Government of President Cortez. One destroyer, the minimum force, should be ordered to *Exaltacion* to ascertain the facts. The cruiser and remaining destroyer should remain beyond Nuevan territorial waters within supporting distance.

The commander of the destroyer should be instructed to interfere with no vessels or activities ashore unless his ship or personnel are attacked. He should then use only the force immediately necessary to protect his ship or personnel.

If discussions are held with PDS representatives, it should be made clear that the United States offers the revolutionists no assistance or other encouragement. Information only is sought.

A similar position should be taken with respect to Cortez officials encountered. If the Cortez government is in control of the port and requests the withdrawal of the United States vessel, the vessel

²⁹ Several comprehensive treatments of intervention by the case method have been published. These are Hodges, *The Doctrine of Intervention* (1915); Thomas and Thomas, *Non-Intervention* (1956) and Graber, *Crisis Diplomacy* (1959). Thoughtful treatments of intervention with an emphasis upon varying perspectives may be found in essays by Fisher, Falk, Cardozo and Burke in Stanger (Ed), *Essays on Intervention* (1964).

should withdraw promptly when the desired information is obtained. If the Cortez government is not in control of the port and requests withdrawal of the vessel, or if the insurgents are in control of the port and request withdrawal, the commander must radio for instructions and put to sea if force is used against him before these are received.

B. PORT CLOSURE DURING INSURGENCY

Situation 2

U.S.S. *Staton* is ordered into *Exaltacion* and determines the officers and crews of *Almirante Medina* and *Almirante Sidonia* have defected. Salvaje controls *Exaltacion*. All Cortez forces have withdrawn. Outposts of Cortez troops are maintained on the roads to *Exaltacion* approximately three miles from the town limits. No United States citizens have been injured. Businesses are being reopened.

Salvaje states he will burn the lumberyards if Cortez troops advance against the town. He has furnished his guards with thermite grenades for this purpose.

The Captain of *Staton*, who has been ashore, estimates that the insurgents have approximately 800 troops in *Exaltacion*. The population of the town appears neither to support nor oppose the insurgents.

Salvaje has declared a blockade of the ports of *Rivadavia*, *Resistencia*, and *Santa Lucia* (see map) in retaliation for the Cortez declaration of blockade of *Exaltacion*. He has so informed the Captain of *Staton*.

At 1100 hours *Almirante Medina* and *Almirante Sidonia* are attacked by Cortez aircraft. *Almirante Sidonia* is hit. Both vessels depart the port and proceed through Nuevan territorial waters towards *Rivadavia*.

At 1500 hours U.S.S. *Montgomery* receives a message from S.S. *American Pioneer*, a vessel of United States registry, that she is intercepted by *Almirante Medina* while proceeding to *Rivadavia*, but while on the high seas, approximately seventeen marine miles from the coast. The master has been informed by the boarding officer that a blockade has been declared by Salvaje and his vessel will be seized if she enters Nuevan territorial waters bound for *Rivadavia*.

At 1600 hours the Cortez minesweeper, *Fifth of September*, intercepts, visits, searches and seizes S.S. *Iowa Cornstalk* within one marine mile from *Exaltacion* under the fire of PDS shore batteries,

places a prize crew aboard and proceeds through Nuevan territorial waters towards *Resistencia*.

No signal is received from *Iowa Cornstalk*. She is believed of United States registry. What action should be taken by United States naval forces in the area?

Discussion: Situation 2

Blockade and Belligerent Recognition

Although Cortez has declared a "blockade" of *Exaltacion*, it is doubtful the term is used in the sense of a "blockade *jure belli*." Establishment of a blockade *jure belli* would be recognition by the *de jure* government of the insurgents as belligerents. This recognition would come, awkwardly, when the insurgency is in its initial stage. In this initial stage Salvaje might be quickly abandoned by his supporters and crushed by the government forces. Recognition of the insurgent belligerency by Cortez would strengthen Salvaje's hand.

Premature recognition by the United States of insurgents' belligerency would probably be treated by Cortez as an "intervention." The United States, for example, protested as premature British belligerent recognition of the Confederacy. The protest was made, although the Union Declaration of Blockade of April 1861 had described a blockade *jure belli* and the Confederates possessed military power and exercised *de facto* control over a territory greater than that of the Nuevan insurgents.

The existence of insurgency in a state creates no special rights or obligations for other states in international law. But when the revolt affects the interests of foreign states in a manner requiring definition of their relations to the insurgents, then these foreign states are entitled to recognize the rebels as belligerents, whether the *de jure* government grants such recognition or not. The question is one of fact.

As stated by The United States Supreme Court in *The Prize Cases*:³⁰

* * * Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain

³⁰ *The Brig Amy Warwick et. al.* (The Prize Cases), 67 U.S. (2 Black), 635, 666 (1862).

portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. * * *

If belligerency of the Nuevan insurgents was recognized by Cortez' declaration of "blockade," the insurgents acquire belligerent rights in international law and are entitled to establish their own blockade *jure belli*.

If the United States recognized the rebel belligerency, it could then claim neutral status for its vessels. Its obligations would shift under such treaties as the *Convention on the Rights and Duties of States in the Event of Civil Strife*.³¹

Facts Bearing Upon Belligerent Recognition

Reconnaissance by *Staton* has revealed the insurgents far from a condition possibly eliciting recognition of their belligerency either by the Cortez government or by another state. The insurgents control one town. They have an army of 800 men. Two insurgent destroyers are at sea. One is probably damaged. Support of the insurgents by the population of *Exaltacion* is in doubt.

While the insurgents have driven Cortez troops out of *Exaltacion*, the town is partially invested. The insurgents have not commenced a struggle to oust the *de jure* government. At this stage they simply claim reinstatement of their party and appointment of their leader to high political office.

The insurgency shows signs of developing into a full-scale revolt. But this does not justify belligerent recognition by the United States of the rebels or reading into the declaration of "blockade" by Cortez a meaning which the facts revealed by the reconnaissance fail to support.

Suggested U.S. Naval Policy Absent Belligerent Recognition

The United States naval forces should deny to both the *de jure* government and the insurgents belligerent rights to establish a blockade *jure belli* with respect to United States vessels. United States naval forces should oppose a visit and search or attempted seizure by Nuevan vessels of United States vessels on the high seas. A simple visit by a government or insurgent vessel to give notice of the existence of a declared "blockade" without further action to obstruct or hinder an American vessel should be unobjectionable.

³¹ 46 Stat. 2749 (1929-31). Relevant provisions of the convention are considered hereafter in this Discussion.

Effect of Port Closure by De Jure Government

However, either the *de jure* government or the rebels, although they cannot maintain a blockade *jure belli* without belligerent recognition, may be able to close Nuevan ports.

United States policy concerning closure of ports by a *de jure* government is unclear because of inconsistency between American statutes and our diplomatic practice dealing with port closures. The United States seems to apply a double legal standard, one with respect to its own insurgents—another with respect to insurgents in other states.

The United States statutes dealing with port closures, enacted during the American Civil War, permit closure of an insurgent port in the United States simply by decree. Domestic or foreign vessels violating such a decree are forfeit.³²

By our diplomatic standard, a *de jure* government can close ports in insurgent hands only by a blockade effectively maintained. Application of this standard is puzzling because of United States policy to withhold belligerent recognition. Nevertheless, the acts deemed necessary to close a port seem to constitute a blockade *jure belli* with the consequences flowing therefrom.

In the Spanish Civil War, for example, the United States withheld belligerent recognition of the Franco insurgents. When the loyalist government declared certain ports and adjacent areas a war zone to which entry would be prevented by the loyalist fleet, the United States replied it could not:

* * * admit the legality of any action on the part of the Spanish Government in declaring such ports closed unless that Government declares and maintains an effective blockade of such ports. * * *³³

A similar position was taken by the United States concerning closures of Chinese ports in Communist hands by the Nationalist Chinese Government in 1949.³⁴

In the Spanish and Chinese civil wars, the strength and activity of the insurgents produced a *de facto* belligerency whether other states recognized these facts or not. It may be that the posture of the United States in these conflicts was to force recognition of this *de facto* condition by the *de jure* governments. The United States would then be in a sound position to insist upon neutral rights for

³² 50 U.S. Code 205 *et. seq.*

³³ 15 Department of State Press Releases, 192 (1936).

³⁴ 21 Department of State Bulletin, 34 (1949).

its shipping without preceding the *de jure* government in recognizing the insurgent belligerency. However, the United States has assumed the same posture when no *de facto* belligerency existed.

Thus, in 1912, Veracruz fell into insurgent hands under conditions not warranting their recognition as belligerents. The port was closed by a decree of the Mexican Federal Government.

The United States Charge d'Affaires informed the Mexican Foreign Office:³⁵

As a general principle a decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extra-territorial effect in the direction of imposing any obligation upon the governments of neutral powers to recognize it or to contribute towards its enforcement by any domestic action on their part. If the sovereign decreeing such a closure have a naval force sufficient to maintain an effective blockade and if he duly proclaim and maintain such a blockade, then he may seize, subject to the adjudication of a prize court, vessels which may attempt to run the blockade. But his decree or acts closing ports which are held adversely to him are by themselves entitled to no international respect. The Government of the United States must therefore regard as utterly nugatory such decrees or acts closing ports which the United States of Mexico do not possess, unless such proclamations are enforced by an effective blockade.

Under circumstances such as those at Veracruz, the Mexican Federal Government could not be expected to recognize the rebels as belligerents nor would the United States formally have accorded such recognition.³⁶ Yet, it is clearly settled in international law that a blockade of the type described and with the consequences expressed in the United States note is a blockade *jure belli* requiring a state of belligerency.

The diplomatic position of the United States with respect to closure of ports in insurgent hands by *de jure* governments stems from the diplomatic position of the Union with respect to the Confederate blockade. Confederate belligerency was never expressly recognized by the Union. Yet an effective "close" blockade of Southern ports was maintained by the Union Navy. Precedent in diplomatic correspondence has perpetuated this anomalous position of the United States with respect to insurgencies in other countries.

³⁵ VII Hackworth, *Digest*, 166 (1943).

³⁶ See I Hyde, *International Law*, 198-202 (1947).

*Positions Concerning Port Closures Taken by
States Other than United States*

Four positions have been taken by states other than the United States concerning port closures in the hands of insurgents by *de jure* governments. By the view popular in Latin America, a decree of closure is sufficient. A second view requires recognition of belligerency followed by imposition of a blockade *jure belli*. A third view, that expressed also in United States diplomatic correspondence, requires maintenance of a blockade which is *de facto* effective whether belligerency is recognized or not. A fourth view recognizes acts done by the *de jure* government, and perhaps the insurgents as well, within the territorial waters of the state in which the insurgency occurs. This recognition is not extended to acts done on the high seas, unless a state of belligerency is recognized. The fourth view appears the most reasonable of those mentioned; and substantially accords with generally accepted international legal doctrine concerning the powers of a state within its territory.

In 1924, the port of Frontera, Mexico, in the hands of insurgents, was closed by the *de jure* Mexican Government. The United States had been informed officially of the closure. It had replied that a port in the hands of insurgents could be closed only by an effective blockade.

On 20 April 1924, *Gaston*, an American ship, entered Frontera and began unloading her cargo on the following day. In the afternoon, she was ordered to leave the port by a Federal gunboat, *Agua Prieta*. When this order was repeated on the 22nd, *Gaston* departed, having unloaded only part of her cargo. She left on the dock a quantity of bananas which quickly spoiled.

A claim for the loss of the bananas was brought by the United States on behalf of the American owners before the United States-Mexico General Claims Commission.

With the United States member dissenting, the Commission stated in part:³⁷

* * * [I]t has been submitted by the respondent government /Mexico/ that the law protecting neutral commerce is not the same after the World War of 1914-1919 as it was before. The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it

³⁷ *United States (Oriental Navigation Co. Claim) v. United Mexican States*, U.S.-Mexico, General Claims Commission (1928), Opinions of Commissioners (1929).

almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy.

On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the Members of the League, under certain circumstances, to carry on economic warfare against an enemy of the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the old rule of the Paris Declaration of 1856³⁸ will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.

If the view set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commissioner, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation. The Commission is of the opinion that the action of the *Agua Prieta* can hardly be considered as a violation obtaining before the world war. It is true that, according to that law, the trading of the *Gaston* to the Port of Frontera was perfectly lawful.

The Federal Mexican authorities would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it. Neither would a Mexican warship have a right to interfere, if, for example on the high seas, it met with a neutral vessel bound for a port in the hands of the insurgents. But on the other hand, the authorities do not show, and the Commission is of the opinion that it cannot be assumed that the Federal Mexican authorities should be obliged to permit the unloading and the subsequent loading of a neutral vessel trading to an insurgent port without such clearance documents as are prescribed by Mexican law, even in case control of the port should have been obtained again by those authorities before the arrival of the vessel to the port or be reobtained during her stay there.

Now, in the present case, it cannot fairly be said that the port

³⁸ By the *Declaration of Paris* of 1856 it was stated: “* * * blockades in order to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.” The question of effectiveness posed by a modern blockade *jure belli* is discussed in Chapter V.

of Frontera was in the hands of the insurgents at the time when the events in question took place. It was in fact partly commanded by the *Agua Prieta*. That being the case, and none of the authorities invoked bearing upon a situation of this nature, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which has not applied to the Mexican Consul at New Orleans for clearance, can hardly be challenged. * * *

The situation until insurgent belligerency is recognized, in which case a right of blockade *jure belli* also is created in the rebels, is one in which the *de jure* government has embargoed a port over which it lacks full control. It can exercise this control within its territorial waters if it possesses a sufficient naval force.

Thus it may properly repel a merchant vessel attempting to enter a closed port. It may, as in the case of *Agua Prieta*, require a vessel to depart the closed port within a reasonable time. The vessel may be seized to remove cargo transported for rebel military use. But the power of the *de jure* government must be exercised reasonably. Its power does not extend to condemnation of the vessel after seizure or destruction of the vessel.³⁹

A contiguous zone in excess of the three marine mile limit may be recognized by some states for enforcement of a port closure order. However, by the position generally accepted, an interception and search to enforce a closure order can be made only within the territorial limit of three marine miles. Visits, searches and possible seizures on the high seas by the *de jure* government require recognition by it of the belligerency of the insurgents, a declaration of blockade, and the ability to maintain an effective blockade.

Effect of Port Closure by Insurgents

Limitations applicable to naval action enforcing port closures by *de jure* governments upon the high seas apply to insurgent governments. Whether similar doctrines apply to activity within territorial waters of a divided state is unclear.

It has been argued that if insurgents fully control a port, they also control territorial waters adjacent to it. The *de jure* government is denied as a matter of law rights of territorial sovereignty in this area.⁴⁰

³⁹ See U.S. Naval War College, *International Law Situations*, 1938, 92-95.

⁴⁰ See VII Moore, *Digest*, 809 (1906): "It thence follows that whenever the dominion over the land is lost, by its passing under the control of another power, whether in foreign war or civil war, the sovereignty over the waters capable of being controlled from the land likewise ceases."

In 1902, Professor George Grafton Wilson recommended recognizing a *de facto* blockade of a port when insurgents had present before it the force required to mount an *effective* blockade had belligerency been recognized. The insurgents were to use only the force necessary to prevent entry of a merchant vessel. This force was to be used only *after* the vessel was notified by the insurgents the *United States* admitted closure of the port.⁴¹

Professor Wilson's memorandum was forwarded to the Department of State for comment. Secretary of State Hay responded in part:⁴²

* * * Blockade of enemy ports is, in its strict sense, conceived to be a definite act of an internationally responsible sovereign in the exercise of a right of belligerency. Its exercise involves the successive stages of, first, proclamation by a sovereign state of the purpose to enforce a blockade from an announced date. Such proclamation is entitled to respect by other sovereigns conditionally on the blockade proving effective. Second, warning of vessels approaching the blockaded port under circumstances preventing their having previous actual or presumptive knowledge of the international proclamation of blockade. Third, seizure of a vessel attempting to run the blockade. Fourth, adjudication of the question of a good prize by a competent court of admiralty of the blockading sovereign.

Insurgent 'blockade,' on the other hand, is exceptional, being a function of hostility alone, and the right it involves is that of closure of avenues by which aid may reach the enemy.

In the case of an unrecognized insurgent, the foregoing conditions do not join. An insurgent power is not a sovereign maintaining equal relations with other sovereigns, so that an insurgent proclamation of blockade does not rest on the same footing as one issued by a recognized sovereign power. The seizure of a vessel attempting to run an insurgent blockade is not generally followed by admiralty proceedings for condemnation as good prize, and no such proceedings were nominally resorted to, a decree of the condemning court would lack the title to that international respect which is due from sovereign states to the judicial act of a sovereign. * * *

To found a general right of insurgent blockade upon the recognition of belligerency of an insurgent by one or a few foreign powers would introduce an element of uncertainty. The scale on which hostilities are conducted by the insurgents must

⁴¹ *U.S. Naval War College, International Law Situations, 1902, 76-77.*

⁴² *Ibid.*, 80-82.

be considered. In point of fact, the insurgents may be in a physical position to make war against the titular authority as effectively as one sovereign could against another. Belligerency is a more or less notorious fact of which another government, whose commercial interests are affected by its existence, may take cognizance by proclaiming neutrality toward the contending parties, but such action does not of itself alter the relations of other governments which have not taken cognizance of the existence of hostilities.

Recognition of insurgent belligerency could merely imply the acquiescence by the recognizing government in the insurgent seizure of shipping flying the flag of the recognizing state. It could certainly not *create* a right on the part of the insurgents to seize the shipping of a state which has not recognized their belligerency.

* * * /A/n insurgent's right to cripple his enemy by any usual hostile means is essentially domestic within the territory of the titular sovereign whose authority is contested. To deny to an insurgent the right to prevent the enemy from receiving material aid cannot well be justified without denying the right of revolution. If foreign vessels carrying aid to the enemies of the insurgents are interfered with within the territorial limits, that is apparently a purely military act incident to the conduct of hostilities, and, like any other insurgent interference with foreign property within the theater of insurrection, is effected at the insurgent's risk.

To apply these observations to the four points presented in Professor Wilson's memorandum, I may remark:

1. Insurgents not yet recognized as possessing the attributes of full belligerency can not establish a blockade according to the definition of international law.

2. Insurgents actually having before the port of the state against which they are in insurrection a force sufficient, if belligerency had been recognized, to maintain an international law blockade, may not be materially able to enforce the conditions of a true blockade upon foreign vessels upon the high seas even though they may be approaching the port. Within the territorial limits of the country, their right to prevent the access of supplies to their enemy is practically the same on water as on land—a defensive act in the line of hostility to the enemy.

3. There is no call for the Government of the United States to admit in advance the ability of the insurgents to close, within the territorial limits, avenues of access to their enemy. That

is a question of fact to be dealt with as it arises. But in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters—their only right being, as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents. * * *

In the Chilean Revolution of 1891, members of the Chilean Congress boarded vessels of the Chilean fleet at Valparaiso and proclaimed a revolt. Rear Admiral McCann, on U.S.S. *Pensacola*, reported the insurgents had seized Chilean coast steamers for use as transports. No blockade had been declared and foreign vessels were allowed to pass in and out of the harbor.

His successor, Rear Admiral Brown, was instructed by the Secretary of the Navy: ⁴³

(1) To abstain from any proceedings which shall be in the nature of assistance to either party in the present disturbance, or from which sympathy with either party could be inferred.

(2) In reference to the ships which have been declared outlawed by the Chilean Government, if such ships attempt to commit injuries or depredations upon the persons or property of Americans, you are authorized and directed to interfere in whatever way may be deemed necessary to prevent such acts; but you are not to interfere except for the protection of the lives and property of American citizens.

(3) Vessels or other property belonging to our citizens which may have been seized by the insurgents upon the *high seas* * * * [italics added] * * * and for which no just settlement or compensation has been made are liable to forcible recovery; but the facts should be ascertained before proceeding to extreme measures. * * *

When the Brazilian fleet revolted in 1893, Mr. Thompson, the Minister to Brazil, inquired from the Department of State whether he was “authorized to protect American merchandise placed on Brazilian barges against the insurgents, using force if necessary,” it being impossible to land the cargoes in Rio at that time unless barges were used.

Mr. Gresham, the Secretary of State, replied:

There having been no recognition by the United States of

⁴³ II Moore, *Digest*, 1107–1108 (1960).

the insurgents as belligerents, and there being no pretense that the port of Rio is blockaded, it is clear that if an American ship anchored in the harbor employs barges and lighters in transferring her cargo to the shore in the usual way and in doing so does not cross or otherwise interfere with Mello's line of fire and he seizes or attempts to seize the barges or lighters, he can and should be resisted. * * * ⁴⁴

Rear Admiral Benham used U.S.S. *Detroit* to prevent interference with the discharge of cargoes by American merchantmen. He also prevented insurgent seizure of neutral vessels or other cargoes even though the cargo concerned would be contraband had a state of belligerency been recognized.

Unlike the Chilean insurgents, the Brazilian insurgents had a land base at Desterro, the capitol of the State of Santa Catharina. The action giving rise to the incidents occurred entirely within Brazilian territorial waters. In neither case did the insurgents control the shore of the port before which the hostile naval activity occurred.

During the Spanish Civil War the right of the Franco insurgents to control the movements of foreign vessels entering the territorial waters of the area of contest was acknowledged in state practice. The right to interfere in any manner with shipping upon the high seas was denied.

Within territorial waters, a foreign vessel might be seized but not condemned; and halted but not attacked.⁴⁵ Judge Hackworth states: ⁴⁶

By their actions outside powers admitted that * * * /Franco/ * * * could intercept and interfere with the commerce of third states within the 3-mile limit. This was true both at Bilbao and at Barcelona, and his actions there were in conformity with those usually allowed to insurgents. * * *

However, when the Spanish insurgents seized on the high seas the United States tanker, *Nantucket Chief*, carrying gasoline from the Soviet Union to the loyalist port of Barcelona, and tried and imprisoned her captain for "complicity in rebellion," the officer and his vessel were released upon informal representations by the United States and upon the promise by the owners to divert the vessel from trade with Spanish ports.⁴⁷

⁴⁴ *Ibid.*, 1115.

⁴⁵ See Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (1939).

⁴⁶ VII Hackworth, *Digest*, 171 (1943).

⁴⁷ *Ibid.*, 173; U.S. Naval War College, *International Law Situations*, 1938, 113.

The Spanish Civil War, however, was a clear situation of *de facto* belligerency, unrecognized by major powers for local political reasons. The interference accepted from Franco insurgents in Spanish territorial waters without contest by other states will not be accepted with equal submissiveness when asserted by insurgents with less land and sea power.

As stated by Secretary of State Hay in 1902, the degree of insurgent control actually tolerated will depend upon variant facts in each insurgency. The scope of the revolt, the extent to which the revolt is land based, the land military power of the insurgents, and their ability to intercept foreign merchantmen within territorial waters, all will have a bearing on the degree of control accepted.

It is possible, for example, that insurgent control might be accepted only for ships capable of military use or of cargoes clearly of a military nature, such as arms, ammunition, or aviation gasoline. By contrast, control by the *de jure* government over entrances to closed ports might be accepted as plenary within territorial waters.

Writers seem agreed that in seizures within territorial waters the offending vessel and its cargo cannot be condemned unless reasonable compensation is arranged promptly. Except in revolutions of the scope of the Spanish Civil War, which was a clear *de facto* belligerency, insurgents probably are restricted to forcing off a foreign vessel from a closed port and many not seize the vessel even for the purpose of a temporary arrest.⁴⁸

Precedents to be used as a guide to govern the relations between foreign states and *de jure* and insurgent activities in territorial waters of a divided state are likely to be developed infrequently in the future. This is due to the inability of either party to conduct naval activity "inshore" when faced with land-based air power or shore ground fire. The contestants may claim powers of visit and search and perhaps seizure on the high seas. But these powers are likely to be contested absent recognition of their belligerency by the foreign state involved.

Suggested Solution: Situation 2

The visit of *American Pioneer* by *Almirante Medina* is unobjectionable when limited to a warning that the vessel will be inter-

⁴⁸ See *U.S. Naval War College, International Law Situations, 1938*, 92-93 in which the same standards are stated for both the *de jure* government and the insurgents. Cf. Wilson, "Insurgency and International Maritime Law," 1 *A.J.I.L.*, 46 (1907) where a distinction is made between the *de jure* government and the insurgents.

cepted in territorial waters if she proceeds into *Rivadavia*. Such a warning would be necessary for a blockade *jure belli* when the proclamation by the blockading power could not reasonably be expected to have come to the attention of the merchant vessel concerned. On the other hand, a search of the vessel or a seizure of it on the high seas would be prevented.

Within Nuevan territorial waters, a search of *American Pioneer* by *Almirante Medina* may be permitted. Further action by the insurgent vessel must be limited to denying entrance to the port of *Rivadavia*. *American Pioneer* must not be sunk nor may it or its cargo be seized.

The Master of *American Pioneer* should be informed he will not receive an armed escort into *Rivadavia*. He should be told the United States recognizes no blockade by the insurgent forces. A United States naval unit will interfere if his vessel is threatened on the high seas or in territorial waters with destruction or seizure.

Assuming Nueva is a party to the *Convention on The Rights and Duties of States in the Event of Civil Strife*,⁴⁹ the United States may capture an insurgent warship, such as *Almirante Medina*, which damages one of its vessels. The captured warship is returned to the control of the *de jure* government. The captains of *Almirante Medina* and *Almirante Sidonia* should be informed of the intentions of the United States naval force and its intention to assert the treaty rights of the United States.⁵⁰ A United States ship should be dispatched to the area of *Rivadavia* to observe the rebel destroyers.

The nationality of S.S. *Iowa Cornstalk* should be determined. If S.S. *Iowa Cornstalk* is an American ship, the Captain of U.S.S. *Montgomery* should inform the Captain of *Fifth of September* the United States will recognize the diversion to the harbor of *Resistencia* only for examination of her cargo. Condemnation of the vessel or mistreatment of her officers and crew will not be permitted.

If the cargo of *Iowa Cornstalk* is material susceptible to military use, other than arms or ammunition or other war material, the United States will permit condemnation of the cargo only if the

⁴⁹ 46 Stat. 2749 (1929-31). 22 Western Hemisphere states, including the United States, are parties. The major purpose of the Convention is to prevent the support of revolutionists from the territories of adjacent states by supply or training of troops.

⁵⁰ *Convention on Duties in Event of Civil Strife*, Article II, paragraph 2. An insurgent merchant vessel interfering with foreign shipping is subject to condemnation by the capturing state as a prize. In neither case is the insurgent vessel treated as a pirate, although it may be declared a pirate by the law of the state in which the revolt occurs. The Convention states such a determination binds no other parties.

owners are promptly compensated. If the cargo consists of arms and ammunition or other war material, the United States will establish no conditions for compensation of the owners. The United States is obliged to prevent such exports pursuant to Article I(3) of the *Convention on the Rights and Duties of States in the Event of Civil Strife*.⁵¹

C. LANDING OF ARMED FORCES TO PROTECT PROPERTY DURING CIVIL DISTURBANCES

Situation 3

The Captain of *Staton* reports Cortez army units, estimated as one infantry division, moving into *Union* and *Victoria*, east and west of *Exaltacion*. Light armor has reconnoitered PDS roadblocks near *Exaltacion* during the past six hours. Cortez aircraft, overflying *Exaltacion*, have not been fired upon.

Salvaje has informed the Captain of *Staton* that if Cortez forces move against *Exaltacion* he will "scorch its earth." A businessman from *Exaltacion*, visiting *Staton* last night, confirms Salvaje has issued orders to his troops to burn *Exaltacion* and its lumberyards. During the diversion thus created, Salvaje's army will move along the coast road to the Luna Mountains, *Almirante Medina* and *Almirante Sidonia* returning to cover this movement. Arms and other supplies are being landed for Salvaje's use by Antioka on beaches near the Luna Mountains.

An officer of *Staton*, posted to observe rebel activity in the lumberyards, reports PDS troops are blowing safes in the offices and removing their contents. They are also removing typewriters and other small equipment. All trucks and other vehicles have been removed and assembled with other requisitioned civilian transportation.

A few minutes ago, our Charge d'Affaires at *Dolores*, radioed Cortez has rejected Salvaje's terms. Cortez intends to crush the revolt and will begin immediate operations against *Exaltacion*.

U.S.S. *Eutaw Springs* (carrier), with 600 marines with airlift capability on board, has arrived from *Coloso*, Antioka, and has joined U.S.S. *Montgomery* off *Exaltacion*, Rear Admiral Jones, aboard *Eutaw Springs*, now commands United States naval forces

⁵¹ For greater detail concerning the problems here examined, see Dickenson, "The Closure of Ports in Control of Insurgents," 24 *A.J.I.L.*, 69 (1930); Woolsey, "Closure of Ports by the Chinese Nationalist Government," 44 *A.J.I.L.*, 350 (1950); Powers, "Insurgency and the Law of Nations," 16 *The JAG Journal* (Office of The Judge Advocate General of the Navy), 55, 59-62 (1962); Briggs, *The Law of Nations*, 1000-1004 (2d Ed., 1952); III Hyde, *International Law*, 2183-2187 (1947).

in the area. He is instructed to "take the measures necessary in your discretion to protect American lives and property in *Exaltacion*, using due care, however, to preserve a strict impartiality between the parties and to employ the minimum force necessary."

Rear Admiral Jones has the information set forth. His staff is considering legal problems involved in landing the marine force to seize the lumberyard and the pumping station in *Exaltacion*. Should the force be landed, and, if so, when?

Discussion: Situation 3

Armed Action to Protect Persons and Property

Armed actions by the United States to protect the lives and property of its citizens have been frequent. Forty cases in this category were listed by Solicitor Clark of the Department of State in 1912. Some of these actions were pursuant to the Platt Amendment, which since has been abrogated.⁵² Twenty-one cases have occurred since Clark's compilation.

By contrast, actions by the United States in other states primarily for political objects have been infrequent. The most important of these prior to World War II were in Cuba (1895-98), Panama in 1903, Haiti in 1915 and in Nicaragua in 1926-27. Action in the Nicaraguan civil war in 1926 was initially nonpolitical but later developed political overtones.

United States expeditions to Archangel and Siberia in 1918 are often called "interventions." However, these expeditions were diversions undertaken against Germany after the military collapse of Czarist Russia.

Nevertheless, it is amply clear that whatever the United States legal posture may have been before World War II concerning unilateral uses of military force for limited "peacetime" objectives, its legal obligations have since shifted, both under international custom and treaties. Its membership in the United Nations and its

⁵² Clark, *Right to Protect Citizens in Foreign Countries by Landing Forces* (Department of State, Division of Information, Series M, No. 14, 5 October 1912). The Platt Amendment, 31 Stat. 897 (1902) was attached to an Army appropriation bill and later embodied in a treaty between Cuba and the United States. The Amendment provided in part:

* * * /T/he government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed or undertaken by the government of Cuba. * * *

The abrogation appears in IV U.S.T., 4054 (1938).

participation in regional security organizations have influenced the legal position of the United States profoundly. Admiral Jones might have landed the marines without hesitation in 1870. Today he must pay close attention to the treaty commitments of the United States.

An initial problem faced by the Admiral and his staff will be to sift out proposed actions which might be regarded by authoritative decision makers in the general community as "interventions" and thus "delicts" from actions which almost certainly will not be so regarded. Reference to traditional international law texts will be found of little help.

The term "intervention" has been employed by observers to seek factual orientation in terms of particular behavior and at the same time to refer to legal conclusions stemming from their observation. Not only are varied practices characterized as "intervention," but the legal conclusions embraced by the term are obscure. There is much discussion of "intervention"—and little is ever done about it. As stated by Professor Burke:⁵³

* * * The same observer sometimes uses a single label to designate very different phenomena, and of course an occasional similarity in labels by no means implies similarity in factual or legal reference. Among the major identifiable confusions of this type are the employment of the same terms to refer to the facts of coercive conduct and to supposed legal consequences and the use of identical concepts to refer, without qualification, to both lawful and unlawful coercion. An accompanying confusion is

⁵³ Burke, "The Legal Regulation of Minor International Coercion: A Framework of Inquiry" in Stanger (Ed) *Essays on Intervention*, 88 (1964). Professor Burke's essay contains a concise statement of the current positions of a number of publicists concerned with minor coercion and presents a suggested multifactual framework for analysis of these policy exchanges. Thus, he commences with an appraisal of the process of interaction, identifying the participants, their objectives, the conflict situations, the base values involved, the strategies of the participants, the degrees of intensity of coercion obtained and the long-term effects and the conditions under which the coercion occurs. He then examines the claim process—categorizing the claims and counterclaims asserted in the coercive exchanges considered with a clear statement of claims relating to particular sanctioning goals (prevention, deterrence, restoration, rehabilitation, and reconstruction). This is followed by an examination of the process of decision concerning these claims and counterclaims with recommendations for the clarification of community policy.

At a high level of decision making within the general community or within a state, this analysis or major features of it can be pursued effectively—although the lower the echelon of decision, the shorter the time for decision and the more uncertain the available evidence, the more compressed and less detailed such an analysis must become.

to be seen in the common failure to attempt to distinguish between varying intensities of coercion. * * *

Usually "intervention" is used to describe "impacts" of executing state policies in the domestic or foreign affairs of another state. The impacts may be the direct result of interference or may be a remote result. Confusion has occurred because the execution of most state policies will have a degree of impact in the affairs of other states. Consequently, to discriminate between actions likely to be described by authoritative decision-makers of a state or general community as "delictual" and actions which are not likely to be so described, publicists have preferred a *coercive* impact test. Thus Professor Burke's orientation is in terms of *coercion* although he offers a comprehensive and useful analytical scheme by which the context of a particular interference can be related to a process of decision concerning this interference. Standard, and less comprehensive, statements of the "coercive impact" test appear in the Discussion to *Situation 1*. The more obvious the coercion in a particular confrontation the simpler these schemes for decision making are to apply.

Coercion, however, is a concept developed most intensively in municipal legal systems—for example, in cases of fraud, undue influence, duress and the like. In these cases it is often possible to produce evidence concerning a mental response of a specified individual to some antecedent act by another.

When the concept of coercion is transported to the international arena, evidential *lacunae* tend to be encountered in an attempt to relate any specified response to any antecedent act. The person or persons whose wills are said to have been coerced typically are indefinite. A search for coercive *motive* provides no ready answer to the problem because state officials responsible for the interferences under examination dissemble and conceal their motives behind smokescreens of censorship and diversionary action.

No matter how comprehensive the analytical scheme, the scheme cannot be applied effectively in a particular controversy unless the facts can be found; nor can it be used in a "constitutive" sense—(or in the sense of general policy guidance to support and reinforce a legal order)—unless the decision makers involved possess major fact finding resources. When the decision maker has the intelligence facilities to develop these facts, multifactor analytical approaches such as that suggested by Professor Burke are ideal. But for decision makers at low policy echelons—and these are responsible for much of the minor (and in the future may be responsible for much of the major) international interferences—a

touchstone for "impermissible" interferences is needed which is within the span of intelligence or "factfinding" capabilities of the official concerned. In the writer's opinion, much of the indiscriminate labeling of interstate interferences of varying intensities as "intervention" stems from a search for coercion frustrated by a "credibility gap," which causes information sources to be ignored or censorship or other features rendering information sources inaccessible. A lack of evidence has led publicists to presume that interferences by one state in the domestic or foreign affairs of another are coercive with the conclusion that if the interferences are coercive they probably are "delictual."

In the analysis which is here suggested, the writer assumes that in many confrontations involving high intensities of coercion the analytical scheme offered by Professor Burke is the most effective type proposed. The writer also assumes that such a scheme can be used with equal effect in low intensity coercive situations when fact-finding resources are extensive. However, he suggests for "low-level" decision makers dealing with coercive situations of a low intensity with limited fact-finding resources a concept of "intervention" which is administratively geared.

Intervention: Administratively Geared

The first requirement for an administratively geared intervention formula is definition of a zone of interstate action in which interferences by one state in the affairs of another are "potentially impermissible." Interstate action beyond this zone can then be ignored so far as delictual aspects of the action are concerned. Action within the zone can be tested using presumptions of fact and precise forms of analysis.

This zone of "potentially impermissible" interference is most effectively defined by a reference to the practice of the Security Council of the United Nations. While action by the Council has been frequently blocked by the veto, it is nevertheless the international institution before which most significant "intervention" controversies are brought. In almost a quarter century of practice, standards applied by a majority of the Security Council and the changes in these standards are amply clear. From an examination of the Council record concerning Greek frontier incidents, for example, support by Albania, Bulgaria and Yugoslavia of Greek guerrillas was unquestionably regarded as delictual by a majority of the members although action was vetoed by the Soviet Union.⁵⁴

⁵⁴ *U.N. Doc. S/486*. See Goodrich and Hambro, *Charter of the United Nations*, 266-267 (2d Ed., 1949) in which the controversy is briefly discussed.

Security Council practice will change. Its membership may expand and its perspective may be modified. The zone of "potentially impermissible" interferences should change with these changes in composition, viewpoint and practice.

From the perspective of a state decision maker, particularly one at a low administrative level, an outline of the sensitive zone of "potentially impermissible" interference can be defined by his careful judgment concerning the likelihood that a majority of the Security Council will regard the proposed act as: (a) a threat to the peace, breach of the peace or act of aggression under Article 39; (b) requiring provisional measures under Article 40; or (c) requiring enforcement action under Articles 40 or 41. Although the act does not fall within one of these categories, is it nevertheless of a nature which should alert the state decision maker to a response by officials of the state affected which will fall within one of the three categories mentioned? The latter determination will cover many of the "marginal" cases of "intervention."

By directing the attention of a state policy maker to the practice of the Security Council, the doctrine of "intervention" is withdrawn from confusing shadows cast by deductions from a theoretical "independence" of states and by the record of state protests concerning "intervention."

The Security Council is taken as a point of orientation in setting a zone of "potentially impermissible" interferences, rather than the General Assembly, the World Court, or regional security organizations for several reasons.

An "intervention" concept should be geared to the working of institutions organized to manage *international* conflict. Apart from its feature as a transient threat presented to general harmony, international conflict is an important feature in developing international solidarity. The skill with which the conflict is managed determines which feature dominates.

While opinions of the World Court bearing upon "intervention" no doubt are influential in the Security Council, the Court deals sporadically with crystallized fact situations. It is incapable of shepherding a conflict through its full course. Its decisions are usually outdated when rendered. Stringent limitations upon its jurisdiction, delays in getting cases before it, and lack of an effective method to enforce its decisions limit the *continuing participation* of the Court in conflict produced by interferences by one state in the affairs of another.

The World Court also deals principally with cases "amenable to legal solution." The issues presented usually are those thought

amenable to resolution by a shift of wealth from one community to another. Losses due to physical damage to property and personal injuries or death can often be compensated by wealth shifting. But the kind of damage often produced by interferences—breakdowns in loyalty patterns, disturbances of balances of power, and destruction of social institutions—cannot be equated to wealth losses and assessed using wealth units.

The burden of dealing with “intervention” controversies thus tends to fall upon the Security Council, the General Assembly and regional security organizations. General Assembly practice is believed not a satisfactory point for orientation because of the flux in standards developed there due to the membership of new states in the United Nations. In recent years, for example, a double standard appears to have emerged in the General Assembly with seizures of territory, such as the seizure of Goa by India or Indonesian action against the Dutch in West New Guinea tacitly approved, while similar action by former colonial powers is condemned. This pattern may possibly be duplicated in the Security Council but the change process is likely to be slower and the sense of responsibility of Security Council members is likely to be greater than in the General Assembly.

The practice of regional security organizations concerning intervention is dominated by local standards. The local “non intervention” doctrine established by treaty and usage in the Western Hemisphere is an example. Although this local practice must be considered in an “intervention” transaction within the aegis of these local arrangements, the practice is too deverse for the basis of a general “intervention” formula.

The chief purpose of the United Nations, as set forth in Article 1(1) is to:

* * * /M/aintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; * * *

The Organ primarily responsible for attaining this goal under the Charter is the Security Council. The enforcement power of the Council is limited by the “peace attainment” statement of its functions; the veto and double veto by a permanent member pursuant to Article 27 and its construction; and the domestic jurisdiction

clause in Article 2(7).⁵⁵ The domestic jurisdiction limitation does not apply to the peace enforcement functions of the Council specified in Chapter VII.

The institution which deals at some stage with most of the serious intervention controversies produced by interferences and which is charged with primary responsibility for maintaining international peace and security under the United Nations Charter is a logical point of reference for an "administratively geared" concept of "intervention." A study of the prior practice of the Security Council, whether a particular decision proposed was vetoed or not, can provide a common compass for guidance and a sensitive receptor for changing concepts of rights and wrongs in intervention.

Within this general zone of "potentially impermissible" interference, staked out by references to Security Council practice and estimates of probable current responses of Security Council members, there exists a spectrum of permissible action. Presumptions of "permissibility" or "impermissibility" are guides to a decision maker.

The point will be discussed in detail in *Situation 6*, Chapter IV, that reasonable judgments can be made concerning the ability of international security organizations, taken collectively, to diffract the physical features of a coercive exchange and project the conflict on a verbal level. These international security organizations have developed, as a dominant function in peace maintenance, "rheostatic" activity—or intensity reduction of interstate conflict.

If a reasonable judgment indicates the contemplated action, falling within the zone of "potential impermissibility," is also beyond the "rheostatic" influence of international security organizations, taken collectively, then the interference is presumptively impermissible—or an "intervention." The key to such a judgment is the probability of unmanageable "escalation of violence" stemming from the proposed action.

The *form* of the action may be peculiarly offensive and under the existing circumstances, including the "rheostatic" abilities of international security organizations, pose a threat of unmanageable escalation. It has been indicated in *Situation 1* that air intrusions into the territorial airspace of another state seem to be treated as "interventions." Deploying military forces into the territory of another state has been characterized frequently as an "intervention" or "aggression." Professor Quincy Wright, for example, describes "aggression" as:⁵⁶

⁵⁵ The "double veto" describes a veto of consideration whether a particular question is procedural, and thus not subject to the veto, or substantive and thus subject to the veto.

⁵⁶ Wright, "The Prevention of Aggression," 50 *A.J.I.L.*, 514, 526 (1956).

* * * /T/he use of, or threat to use armed force across an internationally recognized frontier, for which a government, *de facto* or *de jure*, is responsible because of act or negligence, unless justified by a necessity for individual or collective self-defense, by the authority of the United Nations to restore international peace or security, or by consent of the state within whose territory armed force is being used. * * *

It is not, however, the "armed" or "military" nature of the force deployed or threatened to be deployed, which should render the action "presumptively impermissible." The size of the force in relation to its mission and the intensity of its employment or threatened employment are the critical features.

Furthermore, it might be argued persuasively, based upon practice since World War II, that deployments of armed forces by Free-World states, with isolated exceptions, are designed to achieve stability to permit ordered change and thus should be presumed "permissible interferences" unless special facts indicate the contrary.

Publicists placing emphasis upon military force as a basic element of an "impermissible interference" view military force in its usual pre-World War II functions of "internal stability-external change." Military force was then used principally to perpetuate a value pattern within a state and to disturb value patterns without the state to direct a flow of values to the sponsoring power base and to diminish the power of adversaries. This is a difficult image to eradicate.

Since World War II, however, the principal role of military force in the organization of Free-World states has been redirected to "internal change-external stability." Prior to the separation of Algeria from France, for example, the civil-action program of the French Army, coupled with its policing functions, emphasized change in the economic structure of Algeria and social reform. The Armed Services in the United States, apart from their external defense functions, have been made instruments of internal change, notably in matters of racial discrimination and in industrial and educational practices through defense contracts.

With few possible exceptions, on the other hand, external employments of armed force have been to procure stability with ordered change accepted and accommodated. This has been the posture of France in Indo-China, the United States and SEATO members in

South Vietnam, the United States and other members of the United Nations Command in Korea and Great Britain in Malaysia.

A strong case for the permissibility of unilateral or multilateral military action, apart from any idea of self-defense or collective self-defense, can be built upon the *interim* stabilizing function of armed action. Interim action was not mentioned in the United Nations Charter because special forces were to be earmarked for that purpose and directed by a Military Staff Committee.

Basic to an understanding of the requirement of "interim stabilizing action" is an understanding of the distinction between "settling a dispute or controversy by force" and "military action to stabilize a situation and prevent its complication pending settlement by pacific means." The international institutional action required to *manage* conflict is similar to the extraordinary power recognized in all legal systems and described in the Anglo-American legal system as "pre-rogative power."

In the constitutional division of powers in the United States, for example, elements of this extraordinary power can be found in the executives, the legislatures and the courts. However, time elapses before this power can be mobilized. There are delays in invoking action by international organizations. Time is also lost before the machinery of these organizations can be set in motion. Without some device to compensate for these delays, the decisions of international security organizations would exhibit the anachronistic features of decisions by the World Court or international arbitral tribunals.

If there were a well-organized police force available for employment by the United Nations to discharge its functions of peace maintenance, one function of this force would be *interim stabilizing* action until decisions by appropriate Organs of the United Nations could be rendered. *Interim stabilizing* action is only one aspect of police functions—but satisfies the pressing demand for temporary order.

Absent such a force, states—individually and collectively—have undertaken this *interim stabilizing* function. Not only is there latitude in this respect for *voluntary* state action, but there is a moral obligation to act—and a legal obligation to act may be developing in international custom built around the Charter.

Interim stabilizing action, although usually within the zone of "potentially impermissible" interference, hitherto described, is the most likely form of action involving military force applied with high intensity to be regarded by the general community as "permissible." The action should be within the limits of the ability of international security organizations to exercise their "rheostatic"

functions—or to project the conflict on a verbal level. *Interim stabilizing* action is keyed to the functions of international security organizations. It is not a substitute for the effective performance of these functions nor should the action be taken in a manner which frustrates the performance of these functions.

The nature of *interim stabilizing* action is illustrated by a comparison of Anglo-French action in Suez in 1956 and United States action in Lebanon in 1958. Both actions involved deployments of military force in the territory of another state. The Anglo-French action seemed regarded by the general community as “impermissible.” While criticized by some publicists, the United States action in Lebanon seemed regarded by the general community as “permissible.”

*Anglo-French Action in Suez and United States Action
in Lebanon Compared as Interim Stabilization*

The Anglo-French military action against Egypt in 1956 was intended in part to insure free passage of commerce through the Suez Canal, to protect foreign nations in the area, and to frustrate Egyptian nationalization of property of the Canal Company. As stated by Sir Anthony Eden in the House of Commons:⁵⁷

* * * /G/rave issues are at stake, and unless hostilities * * * (between Israel and Egypt) * * * can quickly be stopped, free passage through the canal would endanger the ships actually in passage. The members of crews and passengers would total many hundreds, and the value of ships which are likely to be in passage is about £50 million (sterling) excluding the value of cargoes * * *.

There were also political objectives which became apparent as the action progressed. One objective was to frustrate growing Soviet control in Egypt. Another was to interrupt extensive Egyptian aid to the Algerian rebels.

Anglo-French forces had been gradually assembled in the Eastern Mediterranean since the Egyptian Nationalization decree on 26 July 1956. Approximately 70,000 to 100,000 personnel were in the Anglo-French striking force. Egyptian forces sustained casualties in excess of 1,000 before the cease-fire.

Anglo-French military action commenced before Israeli troops, attacking in the Sinai Peninsula and moving rapidly, were within striking distance of the Canal. The action was also taken shortly after the United Kingdom and France had vetoed a Resolution in

⁵⁷ U.N. Doc. S/PV 749, 30 Oct. 1956, p. 2.

the Security Council ordering Israeli withdrawal to the 1949 armistice line and calling upon members to refrain from the threat or use of force in the area inconsistent with the purposes of the United Nations.

The Council commenced consideration of this Resolution at approximately the time on 30 October 1956 that the United Kingdom presented its ultimatum to Israel and Egypt. This ultimatum required withdrawal of both forces ten miles from the Canal, that hostilities cease, and that Anglo-French forces be permitted temporarily to occupy Port Said, Ismailia and Suez. If these conditions were not met within twelve hours, Anglo-French forces would intervene in the strength necessary to secure compliance.

Sir Pierson Dixon, apparently conscious of the importance of an "*interim sustaining action*" argument, sought to delay action on the Resolution before the British and French vetoes. Sir Pierson emphasized in his argument the inadequate military force available to the Council and the urgency of the situation. He asserted:⁵⁸

If we felt that the Security Council could in fact at this moment separate the parties and protect the Canal, of course we would rather proceed in this way. But in spite of the views which have been expressed to the contrary, I think I must make the point again: we feel grave doubt whether in fact action could be taken in this Council with sufficient speed. Events are moving too fast, too fast for words even from the Council to have the right effect. * * *

Sir Pierson emphasized also:⁵⁹

* * * Our intervention is a temporary measure which we are obligated to take in the absence of any effective collective machinery for restoring peace and order in a matter of such extreme urgency * * * /and/ * * * will be terminated as soon as the threat to peace no longer exists. * * *

After the Resolution was vetoed by the intervening states, the case was removed from the agenda of the Security Council, over the opposition of the intervenors, pursuant to a Resolution offered by Yugoslavia. The case was then placed before the General Assembly, acting under the Uniting for Peace Resolution of 1950. The General Assembly called for a cease-fire and withdrawal of forces behind the 1949 armistice line.⁶⁰

⁵⁸ *U.N. Doc. S/PV 749*, 30 Oct. 1956, p. 24.

⁵⁹ *U.N. Doc. S/PV 751*, p. 9.

⁶⁰ A concise account of procedure before the Security Council and thereafter before the General Assembly may be found in *Yearbook of the United Nations*, 25-34 (1956). The Yugoslav Resolution, as supported by the United States, appears as *U.N. Doc. S/3719*.

By this time, Anglo-French forces had virtually destroyed the Egyptian air force, which had approximately 90 MIG-15 fighters and 28 Iluyshin bombers. Israeli troops, assisted by Anglo-French seaborne and airborne landings which had cut off Egyptian Sinai forces from the main body of the Egyptian army concentrated south and southwest of Cairo, had virtually complete control of the Sinai Peninsula. Israeli patrols reached the Canal by 4 November.

A cease-fire was obtained on 7 November. Before ceasing hostilities, Anglo-French forces had seized firm control of key points in the Canal area. Prior to the cease-fire the Secretary General had assured the United Kingdom and France that the Canal would be reopened and free navigation secured through it. An international force sufficient to secure observation of the 1949 armistice would be established by the United Nations.⁶¹

The landing of United States forces in Lebanon in 1959 presented striking contrasts to Anglo-French operations in Suez. Unlike the Anglo-French operations, United States action in Lebanon was primarily political and not economic in aim. The landings were at the request of the *de jure* government of Lebanon. Small forces were landed without preparatory fire.⁶² There was no significant hostile action. Casualties and property damage were minimal.

The Lebanese action was undertaken in a clear emergency. Such an emergency had apparently been recognized by the Security Council in its response to the Lebanese complaint of 22 May 1958 that the United Arab Republic was intervening in its internal affairs by supplying and training rebels.⁶³

Although the intervention in Lebanon by the United Arab Republic had not only been verified by Western intelligence services but was notorious from press releases, the Security Council on 11 June 1958 directed the Secretary General to establish an observation group in Lebanon to verify the reports of outside interference. The Resolution was amenable to construction that the Secretary General was to act to prevent outside interference.⁶⁴ However, the Secretary General construed his power as simply one to investigate.

⁶¹ For a history of subsequent events, including Anglo-French withdrawal, development of a United Nations Emergency Force and clearance of the Canal, see *Yearbook of the United Nations*, 39-56 (1956).

⁶² 3,500 troops were landed initially. The force was increased to approximately 15,000.

⁶³ *U.N. Doc. S/4007*, 22 May 1958.

⁶⁴ *U.S. Doc. S/4023*, 11 June 1958. The Resolution authorized the Secretary General to "ensure that there is no illegal infiltration of personnel or supply of arms or other material across the Lebanese border." For the construction by the Secretary General see *U.N. Doc. S/PV 827*, 15 July 1958, p. 13.

The investigation by the Observation Group was frustrated by the rebels. The rebels held 90% of the Lebanese frontier over which supplies and troops from the United Arab Republic might have come. The Observation Group was denied access to this area.⁶⁵

The Observation Group had no aircraft for reconnaissance. It conducted few night patrols because of fire drawn from both sides. It had no electronic sensing devices to be used for night surveillance from fixed observation posts. It is conventional practice, both in regular armies and among guerrillas, to move supplies and troops at night in the face of air superiority. This air superiority was enjoyed by the *de jure* government.

Thus, before the United States landings on 15 June 1958, the work of the United Nations Observation Group was completely ineffectual and showed no promise of improvement.⁶⁶ The *de jure* Lebanese government was certain to fall unless the United States responded to its request.

The Security Council was informed promptly of the United States action. In the Security Council debates which followed, the position of the United States was one of cooperation with the Council. The Council was encouraged to undertake the protection of Lebanon against external interference. United States troops were instructed to cooperate with the United Nations Observation Group and did so. As Ambassador Lodge stated before the Security Council:⁶⁷

Our purpose in coming to the assistance of Lebanon is perfectly clear. As President Eisenhower explained this morning, our forces are not there to engage in hostilities of any kind, much less to fight a war. Their presence is designed for the sole purpose of helping the Government of Lebanon at its request in its effort to stabilize the situation brought on by threats from outside, until such time as the United Nations can take the steps necessary to protect the independence and political integrity of

⁶⁵ U.N. Doc. S/4040 and Add. 1, 1 July 1958. The First Report by the Observation Group stated:

* * * It will be seen, therefore, that the areas of primary concern to the Observation Group are those where the problems of accessibility are greatest, both from the standpoint of topography and of obtaining freedom and security of movement.

⁶⁶ The Observation Group reported its work initially impeded by an adverse reaction among the rebels to the United States landings. U.N. Doc. S/4069, 25 July 1958. However the strength of the Group and cooperation by the rebels later improved, although there were no night observations by the Group except in a few instances.

⁶⁷ U.N. Doc. S/PV 827, 15 July 1958, p. 6.

Lebanon. This will afford security to the several thousand Americans who reside in that country. That is the total scope and objective of the United States Assistance.

The United States offered a draft Resolution to the Security Council which, in addition to supporting activity by the Observation Group and recommending extension of this activity, requested:⁶⁸

* * * /T/he Secretary General immediately to consult the Government of Lebanon and other member states as appropriate with a view to seeking an agreement for additional measures, including the contribution and use of contingents, as may be necessary to protect the territorial integrity and independence of Lebanon and to ensure that there is no illegal infiltration of personnel or supplies of arms or other material across the Lebanese border.

This Draft Resolution was vetoed by the Soviet Union. The vote was 9 in favor of the Resolution, 1 abstention, and 1 against.

A Resolution offered by the Soviet Union, condemning the United States and ordering an immediate withdrawal of its troops, was defeated by a vote of 8 to 1. There were two abstentions—Japan and Sweden.

A Resolution offered by Sweden, calling for withdrawal of the Observation Group while United States forces were in Lebanon, was defeated by a vote of 9 to 2. The favorable votes were those of Sweden and the Soviet Union.

A Resolution thereafter offered by the United States to remove the case for consideration by the General Assembly did not come to a vote. The Council adjourned on 22 July 1958 after receiving a suggestion by the Secretary General that he might undertake to bring the parties to an agreement. A "Summit Meeting" also was then thought imminent.⁶⁹

The case was brought again before an emergency session of the General Assembly in August 1958. British troops had entered Jordan in July 1958 in response to a request by King Hussein. The Assembly considered a six-point program of action proposed by the United States but threw the matter back into the lap of the Secretary General.⁷⁰ The Secretary General was directed to consult with the Arab states and make practical arrangements to

⁶⁸ *U.N. Doc. S/4050.*

⁶⁹ This Summit Conference did not materialize but the United States and the Soviet Union agreed on an emergency session of the General Assembly. See 39 *Department of State Bulletin*, 342 (1958).

⁷⁰ 39 *Department of State Bulletin*, 337 et seq. (1958).

facilitate "early withdrawal of foreign troops from Lebanon and Jordan."⁷¹

The United States withdrew its troops from Lebanon in late October and November of 1958. General Chehab, who received rebel support, as well as support from government elements, had been named President in free elections held in July. Political unrest stemming from external sources had greatly diminished.

Both Anglo-French action in Suez and United States action in Lebanon were within the zone of "potentially impermissible" interference. The military force deployed was significant. The intense Anglo-French use of military force might reasonably have been viewed by the Security Council as a threat to the peace, a breach of the peace or act of aggression. United States action in Lebanon might have provoked a response by other states requiring provisional measures under Article 40 or enforcement measures under Article 40 or 41.

Although falling within the zone of "potentially impermissible" interference, no doubt a mild presumption of "permissibility" can be said to exist based upon the past pattern of military action by Free-World states. The Anglo-French action, however, was of such intensity that it might have exceeded the "rheostatic" action of international security organizations, taken collectively, had it not been for Soviet involvement in Hungary at the same time.

Furthermore, rather than pitching their action as *interim stabilization*, supporting functions of the United Nations, the United Kingdom and France prevented Security Council action by a veto. Reference of the case to the General Assembly was opposed by them.

Nationalization of the Canal was under study by the Security Council before the Anglo-French intervention. It was only when Anglo-French military objectives had been achieved and the adverse effect of world opinion appraised that the United Kingdom and France were prepared to support a renewal of United Nations functions in the crisis.

United States operations in Lebanon, by contrast, were closely geared to efforts by the United Nations to achieve stability in Lebanon and provide for ordered change in its government by free elections. United States action was clearly within the "rheostatic" or intensity reducing range of international security organizations.

Anglo-French action in Suez and United States action in Lebanon can be supported as "collective defensive" actions under Article 51 of the United Nations Charter. It will be suggested in greater

⁷¹ U.N. Doc. S/4053.

detail in the *Discussion of Situation 6*, Chapter IV, that no matter how *effective* international organizations become as peace maintaining institutions, Article 51 permits the use of armed force to meet armed attack. The test in such a case is the necessity and proportionality of the responding coercion *vis-à-vis* the initiating coercion. Likewise, Article 2(4) establishes *maximum* limits on the use of force no matter how ineffective international security organizations become as peace maintaining institutions.

Assuming the Anglo-French action did not exceed this maximum limit, as a threat or use of force against the territorial integrity or political independence of a state, or in any other manner inconsistent with the purposes of the United Nations, defense arguments might be persuasive.

United States action in Lebanon was defended by government spokesmen as "collective self-defense" under Article 51. It was also attacked by a few publicists as "impermissible" interference.⁷² The defense arguments offered were unnecessary, however, because the *interim sustaining* nature of the United States action was clear; and a growing general appreciation of the importance of such organizational services in the light of the present state of international security organization functions, promises future community characterizations of *sustaining* actions as permissible. The *interim sustaining* action argument was open to the United States but foreclosed to the United Kingdom and France.

General criticism of the Anglo-French action in Suez should not be regarded as condemnation of unilateral national action to protect the lives and property of citizens under circumstances in which the protection is of an *interim* nature pending action by an international security organization. If the unilateral national action, entailing minimum force, obviates further action by an international security organization, the interest of the general community is well served.

Policies in Western Hemisphere Concerning Action To Protect Property During Civil Disturbances

Western Hemispheric treaties and conventions, many of which were mentioned in the *Discussion to Situation 1*, purport to establish new

⁷² Propriety of the United States action in Lebanon was questioned both under the United Nations Charter and under the Kellogg-Briand Pact. Professor Quincy Wright concluded the United States, to justify its intervention in Lebanon, "would have to prove that the troubles in that country inducing President Chamoun to request that intervention were primarily due to 'subversive intervention' from outside." Wright, "United States Intervention in Lebanon," 53 *A.J.I.L.*, 112, 125 (1959).

“intervention” doctrines. These doctrines have been vaguely framed. An actual meeting of the minds upon various definitions appears to have been blocked by a heavy alloy of emotion.

Agreement upon the meaning of “intervention” in the Western Hemisphere seems closer under the Organization of American States than ever before. The statement by Secretary Hughes and the Sixth Conference of Inter-American States in 1928 continues, however, to highlight this gray area of affairs so far as the protection of citizens and their property is concerned. As Secretary Hughes commented: ⁷³

* * * The difficulty, if there is any, in any one of the American Republics, is not one of external aggression. It is an internal difficulty, if it exists at all.

From time to time there arises a situation most deplorable and regrettable in which sovereignty is not at work, in which for a time in certain areas there is no government at all, in which for a time and within a limited sphere there is no possibility of performing the functions of sovereignty and independence. These are the conditions which create the difficulty with which at times we find ourselves confronted.

What are we to do when government breaks down and American citizens are in danger of their lives? Are we to stand by and see them killed because a government in circumstances which it cannot control and for which it may not be responsible can no longer afford reasonable protection? I am not speaking of sporadic acts of violence, or of the rising of mobs, or of those distressing incidents which may occur in any country however well administered. I am speaking of the occasions where government itself is unable to function for a time because of difficulties which confront it and which it is impossible for it to surmount.

Now it is a principle of international law that in such a case a government is fully justified in taking action—I would call it interposition of a temporary character—for the purpose of protecting the lives and property of its nationals. * * * Of course the United States cannot forego its right to protect its citizens. * * *

Secretary Hughes emphasized in his statement the protection of the *persons* of United States citizens and only incidentally protection of their property. The need for protection of property has been alleviated to a degree by investment guarantees developed under successive Mutual Security Acts and a supporting framework of

⁷³ *Report of the Delegates of the United States of America to the Sixth International Conference of American States*, 14 (1928).

executive agreements made between the United States and countries participating in the mutual security program. The Foreign Assistance Act of 1961, for example, authorizes guarantees to assure protection in whole or in part against:⁷⁴

Loss of investment * * * in the approved project due to expropriation or confiscation by action of a foreign government, and

Loss due to war, revolution or insurrection * * *

These losses normally are excluded from casualty insurance coverage issued by commercial carriers. But the insurance principle is the same in mutual security program guarantees, the risk of loss being distributed over the taxpaying public and being substantially eliminated by the law of large numbers.

Supplementing executive agreements with mutual security program countries, in whose territories investments are guaranteed, provide for subrogation by the United States to any claims which its insured nationals may have. The claims are to be settled by negotiation or arbitration.⁷⁵

The risk of expropriation remains considerable among Western Hemispheric states. However, the risk of loss due to civil disturbances is reduced due to rapidly increasing efficiency of the national military and police forces. The spread of the Castro-Communist revolutionary influence may of course present acute problems no matter how efficient local military and police establishments become.

These changes in the guaranteeing of foreign investments and efficiency of local military and police protection may account for statements in recent authoritative works suggesting armed force cannot be used to protect the persons and property of citizens in another state in the Inter-American system.

Thomas and Thomas, for example, declare with reference to the Inter-American system:⁷⁶

No state has a right to intervene in another state in favor of the lives or liberty of its nationals except through intercession of diplomatic representation in a friendly conciliatory action without any character of coercion, undertaken only after there has been previous exhaustion of the possible local remedies and a clear denial of justice. If this fails, the legality of further action is problematical. * * *

⁷⁴ P.L. 87-195 (4 Sept. 1961) Sections 221 *et seq.*

⁷⁵ E.g., *Executive Agreement with Honduras*, 6 U.S. Treaties 2049 Section 1(c) (1955).

⁷⁶ Thomas and Thomas, *Non-Intervention*, 327 (1956).

These authors also state, after a discussion of the responsibility of states for injuries to aliens and the right of a state to collect debts by force:⁷⁷

Thus, it can be said that intervention by force by a state for protection of the property of its citizens in another state has been made illegal under the particular international law of the Americas.

Dr. Graber writes:⁷⁸

How could frequent American interventions for the protection of citizens in foreign countries be reconciled with the non-intervention doctrine? The answer is simple. There was no need to reconcile them because the United States did not consider measures taken for the protection of citizens as intervention. When the interventionary character of these measures was finally conceded in the twentieth century, armed protection of citizens stopped and unarmed coercion on their behalf dwindled. * * *

Statements such as these, when read in context, probably are intended to apply to armed or coercive efforts to collect debts or damages resulting from injuries to citizens. Although the "non-intervention" principle, applied to the Inter-American system, is stated broadly by the authors cited and others, it is doubtful the proposition stated by Secretary Hughes in 1928 is or can be obsolete. The United States must protect its citizens when a local government cannot protect them.

No Latin American government appears to have contested the assertion by Secretary Hughes when restricted to the conditions stated by him. The majority of the Inter-American Juridical Committee included no case such as that stated by Secretary Hughes within the list of impermissible interferences prepared by it in 1959. Indeed, the Committee cited with apparent approval the statement by Accioly:⁷⁹

The protection of nationals, no matter where they may be, is not only a right but a duty of the state. Since it is not, therefore, an abusive act, it lacks one of the basic elements constituting intervention.

Construction of Article 15 of the Charter of the Organization of American States, which takes into consideration the immediately related Articles 16, 17 and 18, suggests the actions prohibited are

⁷⁷ *Ibid.*, 343.

⁷⁸ Graber, *Crisis Diplomacy*, 336 (1959).

⁷⁹ Inter-American Juridical Committee, *Instrument Relating to Violations of the Principle of Non-Intervention*, 10 (1959).

those that are "abusive" or "coercive." The military action specifically mentioned, such as the "armed force" in Article 15; the "military occupation or * * * other measures of force" in Article 17; and the "force except in the case of self-defense" in Article 18, seems to refer to action with political orientation.

Military action taken to acquire territory, supersede a government, obtain special concessions or to secure various political advantages, seems easily distinguishable from limited action to protect the persons and property of citizens which is terminated when the persons or property are withdrawn or are otherwise secured. Applications of military force for this limited purpose can also be made without appreciable coercive effect upon the wills of a local power elite, if coercion is put in issue, and—as pointed out previously in this discussion—need not be of such an intensity that it constitutes a threat to the peace or a breach of the peace under Chapter VII of the United Nations Charter.

Suggested Solution: Situation 3

While military action of a preventive nature, such as that contemplated at *Exaltacion*, may or may not receive such publicity that it will be discussed by the Security Council of the United Nations or by the Council of the Organization of American States, the action should be planned and conducted so that it is actually preventive and protective. The threat of the property of citizens must be clear and if lives of citizens are also found to be endangered the case for action will be much stronger.

The case is not one of self-defense as discussed by Secretary Webster in *The Caroline*.⁸⁰ While the threat of damage must be clear, there need not be that "instant, overwhelming" necessity "leaving no choice of means and no moment for deliberation" cited by Webster to Lord Ashburton.

Measures unnecessary to protect lives and property should not be attempted. If action is initiated by either the United Nations or the Organization of American States before the marines are landed, United States action should be coordinated with the supplementary measures taken by these institutions. If no action is taken by these organizations, which is the more likely situation in view of the short time involved, the United States position should be one of forestalling a controversy concerning loss of lives or property by the use of minimum force. If a threat of force will accomplish this aim, the action should be limited to the threat. Only the commanding officer on the spot can formulate an accurate judgment concerning

⁸⁰ II Moore, *Digest*, 412 (1906).

this. An argument for *interim sustaining* action should be built to support the interference as "permissible."

The facts available to Rear Admiral Jones suggest Salvaje desires to avoid contact at this time with Cortez forces and is preparing to withdraw from *Exaltacion*. The lumberyards and much of the town can be quickly destroyed by Salvaje's army.

At this critical stage of the revolt, Salvaje is probably desperate. His ability to continue the fight, in view of his failure to inspire support in *Exaltacion*, depends upon his ability to reach the Luna Mountains. His eventual success, once he gets there, will be based upon his ability to enlist foreign support and to discourage foreign support of the Cortez government.

As stated by George Modelski: ⁸¹

That every internal war creates a demand for foreign intervention is implicit from the logic of the situation. The demand may not always be capable of being satisfied, but it is always there, and has been found to exist not only in modern political history but in all known international systems. * * *

Salvaje will thus be likely to cooperate with United States forces in the immediate future to avoid interference with his sources of overseas supply. Rear Admiral Jones should capitalize upon this predisposition of Salvaje.

A landing of forces without warning would antagonize the insurgents. They might cause property damage or kill United States citizens before being driven off. But the insurgents should clearly understand that the United States will land forces to protect the lives and property of its citizens with or without the consent of Cortez or Salvaje and there is a legal basis for this action. Salvaje should be informed that the necessary force is on hand and can be landed immediately. He should also be informed that if *Almirante Medina* and *Almirante Sidonia* appear to cover withdrawal of the PDS troops, and the property of United States citizens is destroyed during this withdrawal as a diversion, the ships will be captured and returned to the Cortez government pursuant to the *Convention on the Rights and Duties of States in the Event of Civil Strife*.⁸²

Salvaje should be informed that if United States citizens are uninjured and their property unharmed, our forces will neither interfere with nor support his withdrawal nor will we undertake to inform Cortez forces the withdrawal is occurring. If Salvaje indicates he will persist in his plan to burn the lumberyards and *Exaltacion*, the marines should be landed in the force required to

⁸¹ Modelski, *The International Relations of Internal War*, 6 (1961).

⁸² 46 Stat. 2749 (1929-31).

evacuate United States citizens to *Eutaw Springs*; protect our consulate; and prevent if possible, or otherwise to minimize, damage to the lumberyards.⁸³

D. SEIZURE OF PROPERTY BY DE JURE GOVERNMENT

Situation 4

Three hours after Rear Admiral Jones notified Salvaje the United States was prepared to land forces to protect the lives and property of its citizens, *Almirante Medina* arrived in *Exaltacion*, took 75 insurgents on board, and proceeded along the Nuevan coast through territorial waters to the east. The remaining Salvaje forces evacuated *Exaltacion* during the night, moving by truck east along the coast road. Cortez forces, attempting to intercept this truck movement at *Resistencia*, were driven off by fire from *Almirante Sidonia*.

Cortez units moved into *Exaltacion* in division strength this morning. The last units closed at 1000 hours.

At 1200 hours, Rear Admiral Jones is notified by United States Naval Headquarters at *Coloso*, Antioka, the Nuevan Ambassador this morning presented to the Foreign Secretary an ultimatum that Antiokan marines who were landed last night on the south coast of Nueva in the vicinity of the Luna Mountains be withdrawn within twelve hours. All landings of supplies from Antioka in that area must also cease within that time. Failure by Antioka to comply with the terms of the ultimatum would result in full military and naval action being taken against the Antiokan beachheads in Nueva and against the territory and people of Antioka.

At 1730, Rear Admiral Jones receives a message from the commander of *Staton* that the Cortez Army commander in *Exaltacion* has taken the following action: (1) His officers have boarded *Harp*, *West Wind* and *Cypress*, freighters owned by the Virginia Pine Products Corporation and of United States registry. They have informed the respective masters that their vessels have been seized for the duration of "the emergency." (2) The resident managers of the lumberyards in *Exaltacion* have received written notice from the local Cortez Army headquarters that all lumber and machinery in

⁸³ For additional material on the points considered, see Offut, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928); I Hyde, *International Law*, 245-281 (1947); Martin, *The Policy of the United States as Regards Intervention* (1921). Problems in the diplomatic protection of nationals are examined in Dunn, *The Protection of Nationals* (1932). Dunn examines the use of force briefly in Chapter II.

their yards are requisitioned, effective immediately, for military use. They have been required to submit inventories within twelve hours and periodic reports at intervals of twenty-four hours thereafter indicating stock levels.

In response to a message from Rear Admiral Jones our Charge d'Affaires in *Dolores* reports the Cortez Government has ordered a general mobilization. He is unable to determine the intentions of Cortez concerning requisitions or expropriations of property and cannot determine what orders, if any, have been issued to the Cortez Army commander in *Exaltacion*.

The masters of *Harp*, *West Wind* and *Cypress* and the managers of the lumberyards are to board *Staton* at 2100 for a conference concerning the action of the local Army commander.

The Captain of *Staton* requests instructions concerning the position of the United States naval force with respect to these events and requests also instructions concerning information which should be given the masters and managers at the scheduled conference. The staff of Rear Admiral Jones is considering the request of the Captain of *Staton*. What instructions should he be given?

Discussion: Situation 4

Types and Methods of Expropriation

The property of aliens may be expropriated by many methods. The method may be indirect, as by a confiscatory tax or a devaluation of currency. The method may be direct, as a taking of property by judicial process to construct a highway.

The taking may be "individualized," such as seizure of a particular business enterprise, usually called "expropriation." It may be "collective," such as a seizure of all industries of a particular type, often called "nationalization" or "socialization."

The alien may be compensated for his loss. However, most expropriations are confiscatory. No compensation is offered, the compensation is grossly inadequate, or the loss is not compensable.

Examples of confiscatory expropriations are fines, imposed as a sanction to support enforcement of laws; seizure, and destruction or sale, of weapons, vessels or products used in the commission of crimes; and abatements of nuisances, such as destruction of diseased or offensive animals and destruction or denials of use of unsafe structures.

These and many other forms of expropriations occur in all states, including the United States. This country has recognized a similar expropriatory authority in other states, subject to an international legal minimum standard of conduct.

The international legal standard in the view of the United States was expressed succinctly by Secretary of State Hughes in 1923 to the Norwegian Foreign Minister. The United States, during World War I, had requisitioned Norwegian construction contracts, materials and completed vessels.

Following the war the Norwegian claims were arbitrated. The arbitral tribunal awarded a large sum to Norway. But in the opinion of United States officials the tribunal had gone beyond the terms of submission. A particular ground of objection was the decision by the tribunal that a belligerent could not define the extent and termination of an emergency. The United States promptly paid the award, but Secretary Hughes in his cover letter wrote in part:⁸⁴

* * * It is the view of this Government that private property having its situs within the territory of a State, * * * including as in the present case property produced or created therein and never removed therefrom, is from the standpoint of international law subject to the belligerent needs of the territorial sovereign quite regardless of the nationality of the owners, provided that in case of its requisition just compensation be made. Due process of law applied uniformly and without discrimination to nationals and aliens alike and offering to all just terms of reparation or reimbursement suffices to meet the requirements of international law; and thus the requisitioning state is free to determine the extent and duration of its own emergency. * * *

The requisitions discussed by Secretary Hughes occurred during war. The property of a "neutral" was taken. However, requisitions are proper in any emergency for an apparent public use if the conditions described by Secretary Hughes are met.

Summary takings of property are characteristic of national and international emergencies. No extensive formalities or hearings need precede this type of expropriation if thereafter an adequate opportunity is provided the owner by the expropriating state to secure compensation or reparation.

The requisition must be nondiscriminatory. The requisition policy must apply to nationals and aliens alike. Aliens must bear the brunt if they possess the only kind of property needed by the expropriating state.

Requisitions of property of aliens when the property is temporarily within the territory of the expropriating state and the alien is not a resident of the state have presented special difficulty. For example, alien property may be seized while in transit through the territory.

⁸⁴ II *Foreign Relations of the United States*, 627 (1923).

A vessel is usually taken within the territorial waters of a state for a transient purpose, such as loading or unloading cargo.

The tendency in cases of this type is to insist upon strict procedural safeguards before seizure. A clear showing of a major emergency is expected. The application to public use must be certain. Prompt and adequate compensation is demanded.

When the property temporarily within the expropriating state has been derived from local resources *or* when the property was not derived from local resources but the owner is a resident alien, the stringent requirements of the "transient property" rule may be relaxed.

Angary

Seizure of vessels temporarily within territorial waters of the expropriating state has been discussed by publicists both as an exercise of the "Right of Angary" and as a "requisition."

Before the 18th century, particularly during the Middle Ages, various rulers claimed a *jus angariae*. The idea of nationality of a ship or its owner was not then clearly delineated. The obligation of a sovereign to protect his own subjects in the territory of another ruler was ill-defined.

An alien at this time was regarded as a privileged subject of the ruler in whose territory he resided. The alien had correlative obligations in return for the special royal protection to which he was entitled.

Alien vessels thus could be prevented from leaving port in the royal discretion. (*Arret de Prince*.) Their crews could be impressed. Ancient English kings, for example, constantly traveling between England and their lands on the Continent, pressed into service any suitable vessel which could be located when passage was desired. *Jus angariae* was utilized in the conduct of routine royal business and pleasure. Compensation for the forced use often was rendered.⁸⁵

The modern relation of "angary" to "war" stems from several sources. Efforts in the Hague Conventions and Regulations to circumscribe the power of requisition were influential. Angary has

⁸⁵ For a typical statement of the ancient and modern rights of angary and a confusion of these with the modern practice of requisition, see II Oppenheim, *International Law*, 759-766 (7th Ed., 1952); Bullock, "Angary" 3 *Brit. Y.B. Int. L.*, 99 (1922-23). Bullock states at 3 *Brit. Y.B. Int. L.*, 122: "* * * [I]t is of the essence of true right of angary that it shall be a requisition of means of transport for purposes of transport." A sinking of ships would not be a case of angary. Bullock also declares *angary* a right of sovereignty which cannot be exercised in occupied enemy territory. He regards the right as extending to *all* means of transport, sea, air and land.

been discussed extensively in cases concerning assertion of the right against uncondemned vessels and property in the hands of prize courts during war. The most important factor, unquestionably, has been the disproportion between the peace and war needs of a state for ocean shipping. The supply of a modern army places extraordinary demands upon the ocean shipping of any state. The capacity of an enemy for destruction of shipping in modern war outstrips the friendly capacity for construction. Consequently, control is asserted over all vessels other than those of allies useful for military and civilian transport.

A right of requisition of foreign vessels by a *de jure* government of a state seems recognized in any major emergency. The so-called "modern right of angary" no longer extends to the impressment of seamen. It is limited to the seizure of vessels or other means of transport. Consequently, if angary has any modern relevance, tied as it seems currently to a state of war, this relevance must be to seizures of vessels or other means of transport by insurgents.

As applied to insurgent seizures, angary can have currently no major importance. For example, a state which extends belligerent recognition to insurgents cannot later look to the *de jure* government for compensation for insurgent exercises of a right of angary against their vessels. But absent this belligerent recognition, the obligation of the *de jure* government to compensate for insurgent seizures is questionable and compensation is seldom made.

Therefore, today, it seems preferable to deal with seizures of vessels simply as requisitions.⁸⁶ As indicated by Secretary Hughes,⁸⁷ the usual practice is to permit the requisitioning state to determine the degree of emergency. Compensation will be demanded whether the emergency is great or small, real or imagined. The state of the alien whose property was taken may insist upon stricter procedural safeguards when the property is transient. Procedural preconditions to taking the property might be demanded if in the judgment of the state of the alien the gravity of the emergency was slight. The law of "angary" supplies few useful guidelines.

International Agreements Concerning Expropriations

Since not only requisitions during emergencies but expropriations

⁸⁶ Bullock, who rejects the relationship of angary to war or military necessity, and applies the doctrine to seizures of means of transport to be used for transport, may lay the basis for an argument that due to the general community interest in transport a special legal regime should apply to interferences with it. The argument would be stronger if angary could be said to embrace communications facilities as well. See Bullock, *op. cit.*

⁸⁷ See Fn. 84, *supra*.

of all types have become common practice, especially among new states or in states which have undergone revolutionary change, these expropriations typically being confiscatory, attempts have been made to protect the interests of aliens by treaty. Perhaps the most ambitious attempt towards this end in a multilateral convention was the *Economic Agreement of Bogota*, one of a number of agreements reached at the Bogota Conference of 1948.⁸⁸

Article 22 of this Agreement provides equitable treatment for foreign capital. Article 24 reaffirms that foreign capital should be subject to national laws and measures might be taken to insure that it was not used to intervene in the politics or prejudice the security or "fundamental interests" of the receiving state.

Article 25 recited:

The States shall take no discriminatory action against investments by virtue of which foreign enterprises or capital may be deprived of legally acquired property rights, for reasons or under conditions different from those that the constitution or laws of each country provide for the expropriation of national property. Any expropriation shall be accompanied by fair compensation in a prompt, adequate and effective manner.

The United States pressed unsuccessfully for inclusion of a provision such as Article 25 in the Charter of the International Trade Organization, considered at Havana shortly before the Bogota Conference. The Havana Charter was not ratified by a sufficient number of states to come into force. This proved to be the fate also of the Economic Agreement of Bogota.

The *General Agreement on Tariffs and Trade*, developed as a substitute for the Havana Charter, after it became apparent that the latter would never be ratified, did not deal with the rights of individuals. There were no provisions concerning direct expropriations.

In bilateral treaties and executive agreements with many states, the United States has dealt specifically with expropriation problems. In the *Treaty of Amity, Economic Relations and Consular Rights* of 1958 made with the Sultan of Muscat and Oman, superseding a treaty made in 1833, the following typical provision appears:⁸⁹

1. Each Party shall at all times accord fair and equitable treatment to nations and companies of the other Party, and to

⁸⁸ X *Documents on American Foreign Relations*, 516 (1948). For a comment on the Agreement with a critical appraisal of the many confusing reservations made by the parties, see Lockwood, "The Economic Agreement of Bogota," 42 *A.J.I.L.*, 611 (1948); 18 *Department of State Bulletin*, 308 (1948).

⁸⁹ 11 *U.S. Treaties* (Part II, 1960) 1836.

their property and enterprises, and shall refrain from applying unreasonable or discriminating measures that would impair their legally acquired rights and interests.

2. Property of nationals and companies of either Party, including direct and indirect interests in property, shall receive all possible protection and security within the territories of the other Party. Such property shall not be taken except for a public purpose, nor should it be taken without prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof. * * *

Analogous provisions are not inserted in executive agreements with mutual security program countries. However, these agreements do set forth procedures for settling claims for losses resulting from the occurrence of risks subject to guarantees under the Mutual Security Acts. There is an implication that compensation will be demanded by the United States or may be awarded by an arbitral tribunal.

The United States, and many other countries, have treaties regulating the requisitioning of vessels temporarily within the waters of the requisitioning states. Some of the older treaties, such as the Treaty of 1785 between the United States and Prussia,⁹⁰ prohibit requisitions. The more recent treaties admit the propriety of the requisitions and stipulate the measure of compensation.⁹¹

Modern conventions bearing upon the conduct of hostilities, including the Hague Conventions of 1907⁹² and the Geneva Conventions of 1929 and 1949, contain provisions applicable both to requisitions and contributions. The contribution is a general levy, in effect a special tax, which is usually pecuniary in nature but which may be *in kind*.

Hague Convention IV imposes extensive restrictions upon the authority of a military occupant in hostile territory over private

⁹⁰ II Malloy, 1482.

⁹¹ For a collection and analysis of a number of these treaties, see *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, 31 A.J.I.L., Supp. 2 (1936); *U.S. Naval War College, International Law Situations*, 1926, 65-87.

⁹² The Hague Conventions of 1907 were an amplification of the Regulations attached to Hague Convention II of 1899 with respect to the law and customs of war on land and Hague Convention III of 1899 adapting to maritime warfare principles of the Geneva Convention of 1864 for amelioration of the condition of the wounded.

property within its power. Private property cannot be confiscated.⁹³ Requisitions must be proportioned to the resources of the country.⁹⁴ Contributions must adhere so far as possible to the rules of assessment and incidence of taxes.⁹⁵ Proper orders and receipts are required for levies of both types.⁹⁶ Communications and transport equipment and weapons and ammunition may be seized but must be restored or paid for when peace is made.⁹⁷

Provisions in Hague Convention IV, relative to requisitions of private property, are amplified by the *1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War*.⁹⁸ This Convention sets forth a number of requirements for minimum physical safety and well-being which apply to the *entire* populations of countries in military conflict. Hague Convention IV is not equally broad.

However, the only broad provision of the Geneva Convention with possible relevance to requisitions imposes an obligation upon contracting parties to allow free passage of medical and hospital stores, objects necessary for religious worship, and clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.⁹⁹ These items cannot be captured or requisitioned in transit.

The remaining protected categories of persons in the Geneva Convention include those "who * * * find themselves, in case of a conflict * * *, in the hands of a Party to the conflict * * * of which they are not nationals."¹⁰⁰ While these categories are also broader than those included in Hague Convention IV, persons are not in the Geneva categories unless the states of which they are nationals are parties to the Convention and *lack* normal diplomatic relations with the state in conflict.

Subject to these limits to the categories of protected persons in

⁹³ 36 Stat. 2277, Art. 46 (1909-1911).

⁹⁴ *Ibid.*, Art. 52.

⁹⁵ Contributions are pecuniary assessments or assessments in kind which are imposed generally.

⁹⁶ 36 Stat. 2277, Arts. 51, 52.

⁹⁷ *Ibid.*, Art. 53.

⁹⁸ 6 *U.S. Treaties* 3516 (1955).

⁹⁹ *Ibid.*, Art. 23. This obligation is qualified by the condition that the party in conflict or occupying a hostile territory "is satisfied that there are no serious reasons for fearing": that the consignments will be diverted; ineffectively controlled; or that a definite advantage may accrue to the military efforts or economy of the enemy through substitutions. It is probable that any effective operation of the Article is eliminated by the imposition of these conditions. The matter is discussed in greater detail in Chapter V.

¹⁰⁰ *Ibid.*, Art. 4, 11.

the Geneva Convention, pillage of and reprisals against the property of private individuals are prohibited both in the territory of a party to the conflict and in territory under hostile military occupation.¹⁰¹

There is no prohibition of requisitions of labor and services of aliens in the territory of a party to the conflict, but the alien is placed upon the same basis as a national of the party with respect to wages, working conditions and hours.¹⁰² If restrictive measures have been taken against the alien's property, such as "vesting" pursuant to a Trading With the Enemy Act, the measures must be "cancelled" in accordance with the law of the Detaining Power as soon as possible after the close of hostilities.¹⁰³ It is not clear that the "restrictive measures" contemplate "requisitions," although it is arguable that requisitions are included.

Within occupied territories, the occupying state can requisition the services of protected persons over the age of eighteen necessary for the needs of the army of occupation, public utility services, and for feeding, sheltering, clothing, transporting or maintaining the health of the population of the occupied territory. The protected person must be paid a fair wage and his work must be proportionate to his physical and intellectual capacities.¹⁰⁴

Foodstuffs and medical supplies may not be requisitioned except for use by the occupation forces and administrative personnel and then only after the requirements of the civilian population are taken into account.¹⁰⁵ Arrangements are to be made to ensure that fair value is paid for any requisitioned goods.¹⁰⁶

Civilian hospitals may be requisitioned only temporarily and then only in cases of urgent necessity for the care of the wounded and sick. The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.¹⁰⁷ Relief supplies may not be diverted except in cases of urgent necessity in the interests of the population of the occupied territory and then only with the consent of the Protecting Power.¹⁰⁸

¹⁰¹ *Ibid.*, Art. 33.

¹⁰² *Ibid.*, Art. 40.

¹⁰³ *Ibid.*, Art. 56.

¹⁰⁴ *Ibid.*, Art. 51.

¹⁰⁵ *Ibid.*, Art. 55.

¹⁰⁶ The requirement is "Subject to the provisions of other international Conventions" but this limitation seems to require nothing more than adequate receipt with compensation made in the future.

¹⁰⁷ 6 *U.S. Treaties* 3516, Art. 56 (1955).

¹⁰⁸ *Ibid.*, Art. 60.

Protected persons, who are interned, present no special requisition problems, although the Convention prohibits their forced labor, except for medical personnel in a professional capacity; administrative and maintenance work in the places of internment, including kitchen and domestic tasks; and duties connected with protection against aerial bombardment or other war risks. Provision is made for payment of wages.¹⁰⁹ If the property of an internee is withheld upon his release or repatriation by virtue of laws of the detaining power, he must receive a detailed receipt.

The extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly is said to be a grave breach of the Convention.¹¹⁰ This would not, of course, preclude requisitions of property of protected persons, even though on a large scale, if done upon regular orders and with a provision for immediate or reasonably delayed compensation.

Hague Convention V (*Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*) permits the necessary requisition of railway material belonging to a neutral by a belligerent with a restriction that the material must be sent back to the country of origin as soon as possible.¹¹¹ Compensation must be paid in proportion to the material used and the period of usage.

Difficulty was experienced at the Hague Conference of 1907 in formulating this provision. There was considerable opposition at the time to any requisitions of neutral property by a belligerent. The right was finally recognized but limited to cases of imperative necessity.¹¹²

Major General von Gundell of the German Delegation advocated the inclusion of a right of requisition of railway material. He distinguished in argument the slight injury which a state would sustain by returning neutral vessels from the great injury by dislocation of its transportation system which would result from an immediate return of railroad equipment.¹¹³

¹⁰⁹ *Ibid.*, Art. 98. The Detaining Power must open a regular account for every internee. Art. 95. Wages for work done are determined on an equitable basis by special agreements between internees, the Detaining Power or employers other than the Detaining Power. Internees in the categories whose services may be requisitioned must be paid "fair wages" by the Detaining Power.

¹¹⁰ *Ibid.*, Art. 147.

¹¹¹ 36 Stat. 2310, Art. 19 (1909-1911).

¹¹² *U.S. Naval War College, International Law Situations, 1926*, 66.

¹¹³ *Ibid.*, 67-68.

Hague Convention IX (*Respecting Bombardment by Naval Forces in Time of War*) permits bombardment of an undefended town:

* * * if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

The requisitions in such a case must be in proportion to the resources of the place, must be demanded in the name of the commander of the naval force, and must either be paid for or evidenced by receipts.¹¹⁴ There is no authority to bombard for failure to pay money contributions.¹¹⁵

Both the 1929 Geneva Convention for the *Amelioration of the Condition of the Wounded and Sick of Armies in the Field*¹¹⁶ and the Geneva Convention of 1949 on the same subject,¹¹⁷ the latter Convention superseding the former for the United States, contained provisions for the temporary requisition of medical and sanitary personnel, equipment and buildings. These requisitions are limited to cases of urgency and contemplate both limited use of the personnel and equipment, and restitution with reasonable promptness rather than compensation. These requisitions, however, are of privileged persons and property. The Convention cannot be taken as establishing for all purposes principles bearing upon the requisition of property of nonprivileged character.

The only provisions in any of the Conventions explicitly applicable to civil wars are included as "common" Article 3 in each of the Geneva Conventions of 1949. "Common" Article 3 establishes minimum standards of physical treatment of persons. The Article contains nothing concerning requisitions of property. It is stated in this Article that parties to the internal conflict should endeavor to bring into force by special agreements all or part of the provisions of the Conventions.

The Hague Conventions contain a "general participation" clause. The "general participation" clause states, in effect, that the particular Hague Convention is inapplicable unless all the belligerents are parties to the Convention.

Unless the combatants agree to apply their terms, the Hague Conventions cannot be applied directly to a civil war. Nor can the

¹¹⁴ 36 Stat. 2351, Art. 3 (1909-1911).

¹¹⁵ *Ibid.*, Art. 4.

¹¹⁶ 47 Stat. 2074 (1931-1933).

¹¹⁷ 6 U.S. Treaties 3114 (1955). The Geneva Convention of 1929 is still technically in force between the United States and those states which have not ratified the Geneva Convention of 1949 but were also parties to the earlier treaty.

Geneva Conventions be applied directly except to the extent stated in "common" Article 3.

*Applying Principles of International Agreements
As "International Custom"*

It is possible, however, that these Conventions, taken as a group, now express accepted principles of the customary law of war which might be applied to a civil disturbance under special circumstances.

During World War II, for example, Russia was a party to Hague Convention IV. Two of the belligerents, Bulgaria and Italy, were not. Russia, on the other hand, had never become a party to the Geneva Convention of 1929 concerning treatment of prisoners of war. The Nuremberg Tribunal for the Trial of Major War Criminals nevertheless held Germany bound in its relations with the Soviet Union by a customary law of warfare which these Conventions were said to reflect. Thus, with respect to Hague Convention IV, the Tribunal ruled: ¹¹⁸

* * * The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war,' which it thus recognized to be existing, but by 1939 those rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which were referred to in Article 6(b) of the Charter.

With respect to the Geneva Convention of 1929 on the treatment of prisoners of war, the Tribunal cited with approval a statement by Admiral Canaris protesting the departures in treatment of prisoners from settled customs dating from the 18th century.¹¹⁹ In the "High Command Case," ¹²⁰ the United States Military Tribunal applied this rationale, remarking upon the approval of the Canaris statement by the International Military Tribunal: ¹²¹

It would appear from the above quotation that the Tribunal accepted as international law the statement of Admiral Canaris to the effect that the Geneva Convention was not binding between Germany and Russia as a contractual agreement but

¹¹⁸ I *International Military Tribunal (Nuremberg) Trial of the Major War Criminals*, 253 (1947).

¹¹⁹ *Ibid.*, 232.

¹²⁰ *United States of America v. Wilhelm von Leeb, et al.* (Case No. 12) Nuremberg Military Tribunals, X, XI *Trials of War Criminals* (1950).

¹²¹ *Ibid.*, XI, 534.

that the general principles of international law as outlined in this Convention were applicable. In other words, it would appear that the IMT in the case above cited followed the same line of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of international law as accepted by the civilized nations of the world, and this tribunal adopts that viewpoint.

The Geneva Conventions of 1949, like the Conventions of 1929 applied by the Nuremberg Tribunals, contain no "general participation" clause. If one of the parties to a conflict is not also a party to the Conventions, the Conventions nevertheless remain binding upon the parties to it in their mutual relations.

The Conventions likewise apply in any armed conflict which arises between two or more of the parties, with or without recognition of a state of war.¹²² The trend in scope of the Conventions has been since 1907 towards a progressively broader application of their obligations to various stages and conditions of armed conflict.

The provisions of the Conventions with respect to requisitions have, on the other hand, been fairly static. The Conventions of 1907 marked two major changes in principle from the customary doctrine existing at that time.

These changes were that a requisition must be necessary for the needs of the military force or for administration of an occupied territory and must be proportioned to the resources of the people of the country upon whom it is imposed. In addition to these features, which should now be regarded as established in custom, requisitions of private property require: (1) Orders in regular form by a major commander, to ensure that the requisition is necessary for a public purpose and to fix responsibility; and either (2) payment in cash for the articles or services requisitioned or (3) acknowledgement by a receipt with a subsequent payment in cash as soon as possible.¹²³

¹²² E.g., 6 *U.S. Treaties* 3114, Art. 2 (1955). This provision is common to the four Geneva Conventions of 1949.

¹²³ A requisition which is proper under international law when made becomes improper if no adequate compensation is tendered within a reasonable time. See *Goldenberg v. Germany*, *Annual Digest* (1927-28) Case No. 369; *Karmatzucas v. Germany*, *Annual Digest* (1925-26) Case No. 365. The principle was also applied following World War II. See *Case of Phillippe Rust*, 9 *War Crimes Trials*, 71 (1949); *Secret v. Loizel*, *Annual Digest* (1943-45) Case No. 164. The compensation to be paid is not necessarily the market price at the time of requisition but a fair price under the circumstances. II Oppenheim, *International Law*, 412 (7th Ed., 1952).

The trend towards expanding the application of the Conventions, coupled with consistency throughout all of the Conventions in the statements concerning legal conditions for the requisition of private property, appears to support an argument that these requisition principles are recognized today as part of the customary law of war and, under appropriate conditions, might be applied in a civil disturbance.

The aptness of application of the customary doctrine of requisitions as expressed in the Conventions to a civil disturbance may be appreciated when it is recognized that these provisions are no longer of major significance for potential application to a general military conflict fought with modern weapons and tactics. Both requisitions and contributions have been said by publicists to be based upon the "eternal" principle that war must support war.¹²⁴ The enduring and pervasive character of this principle is now open to question.

A major destruction of the resources of a country, familiar during World War II, and assured in any future major conflict in any reasonably predictable form, places an invading military force under the necessity of supplying a civilian population rather than requisitioning its remaining slender resources. The problems are those of employing a civilian population which seeks employment, rather than of requisitioning its services; of supplying medical and hospital items for civilian use, rather than of seeking them for military use; and of providing civilian shelter rather than of diverting it for use in quartering troops. The United States, after World War II, went to lengths to revive and rehabilitate its former enemies to fill a power vacuum. The defeated states were not required to pay the cost of the successful military operations.

Requisitions on any appreciable scale are likely to be made during the conduct of actual military operations against an enemy rather than during military occupation of hostile territory. Regulating the latter regime was of major concern at both the Hague and Geneva Conferences.

During military operations, the trend is likely to be towards requisitions of services necessary for area damage control and maintenance of essential public utilities. The officers ordering such requisitions will probably be small unit commanders. The conditions of requisition may be such that receipts or payment will be neglected. The services, involving as they will a high degree of hazard, will be difficult to value. Food and other articles which are easily contaminated by fission products and difficult to decontaminate will be

¹²⁴ II Oppenheim, *International Law*, 408 (7th Ed., 1952).

carefully avoided by military forces to reduce the exposure of personnel to radiation. The quartering procedures followed during former conventional wars will be abandoned to avoid concentrations of troops and their exposure to attack by ultradecisive weapons. The requisitioning provisions of the Hague and Geneva Conventions will thus quite probably have limited application in a major war.

The principles expressed in these Conventions may nevertheless be applicable to limited wars in which ultradecisive weapons are not used. These wars may be of an international or internal nature. Small units, such as guerrilla bands, may be difficult to locate and supply. When located, efforts to supply them may disclose their positions to the enemy.

These guerrilla units must then live by requisitioning food, medical supplies, shelter and services from the local population. An insurgent army, as in Nueva, its supplies curtailed from other sources, will depend heavily upon requisitions. A *de jure* government may requisition supplies to deny them to the insurgents or to compensate for dislocations in its supply system produced by the insurgency.

The future viability of the Hague and Geneva principles concerning requisitions will thus depend largely upon their adaptability either to limited international wars fought to an appreciable extent with small detached units, typically guerrilla warfare, or to insurgencies in which a status of belligerency has not been recognized. In hostilities of this nature, the conception that "war must support war" still prevails.

Can the principles of the Conventions concerning requisitions be applied as part of the customary law of war to an insurgency, as in Nueva? The belligerent status of the insurgents has not been recognized by any government. The disturbance has not expanded to a point at which a *de facto* state of belligerency can be said to exist.

Most publicists have stated, or assumed, that the customary laws of war are not applied to civil disturbances until the insurgents are recognized as belligerents.¹²⁵ These publicists, however, have discussed in the context of their statements problems which, although perplexing, are nevertheless narrow in scope.

One of the most difficult of these problems has been delineation of the circumstances under which a *de jure* government must treat rebels as prisoners of war rather than subjecting them to summary criminal processes as traitors. It is apparent that no amount of

¹²⁵ E.g., II Oppenheim, *International Law*, 209 (7th Ed., 1952) ; Department of the Army, *The Law of Land Warfare* FM 27-10 (1956).

belligerent recognition of the rebels by other states will go far to prevent a *de jure* government, intent on crushing a rebellion by terror, from applying the most stringent sanctions to its citizens.¹²⁶ Humane treatment may be granted to the rebels to obtain reciprocal treatment of government personnel. But a *de jure* government will seldom encourage a rebellion by expressly granting the rebels belligerent recognition. Accordingly, efforts have been made to divorce the requirement of humane treatment from belligerent recognition, Judge Lauterpacht, for example, having written:¹²⁷

* * * As the law stands at present, a state which denies the character and the rights of belligerents to insurgents who have risen against it and who are in fact possessed of the attributes of belligerency does not act contrary to a clear rule of international law. But it does disregard the principles which underlie the law of war and which are in their essence independent of the formal status of the parties to the struggle.

By contrast, a change in the regime of the high seas from one of freedom of navigation to one in which interference with shipping is tolerated, is keyed to nonrecognition or recognition of the belligerency of the interfering party. This has proven a realistic and economical accommodation of the competitive needs of armed contestants with the commercial interests of peaceful "bystander" states.

Belligerent recognition serves, functionally, as notice to the contestant of the "bystander's" claim to neutral privileges and to citizens of the "bystander" that its neutrality laws apply. Belligerent recognition in this special context supports the element of *coordinated* action among states which is the essence of public order.

While with respect to the recognizing "bystander" state, both the *de jure* government and the insurgents may establish blockades *jure belli*, enforce contraband lists, and visit, search and capture vessels upon the high seas, whether the belligerent recognition is *expressed* or *implied*, these legal incidents are subordinate in importance to the coordination of national and international law and related activity which belligerent recognition accomplishes.

It cannot be assumed, however, that belligerent recognition has the same function of coordination in each context. Nor can it be assumed that belligerent action upon the high seas, while important, encompasses the total area of conflict within which the laws of war might apply.

¹²⁶ E.g., Trinquier, *Modern Warfare, A French View of Counter-Insurgency* (1964) *passim*.

¹²⁷ Lauterpacht, *Recognition in International Law*, 246 (1947).

With respect to the property rights of its citizens in the territory of a state in civil conflict, recognition of a state of belligerency by a "bystander" state exonerates the *de jure* government from the somewhat remote potential liability which it might have for damages to the property caused by the insurgents. Functionally, belligerent recognition in this context is supporting a system of order by a form of waiver, eliminating possible future sources of conflict by eliminating the potential liability of one possible party.

It has never been suggested, on the other hand, that the obligation of either the *de jure* government or the *insurgents* to receipt or pay immediately for property requisition depended upon belligerent recognition. It has been pointed out in *Situation 2* that, absent belligerent recognition, "bystander" states have recognized rights of the *de jure* government and insurgents to interfere with their commerce within the *territorial* waters and on *land* of a state embroiled in civil strife.

The propriety of seizures of property of a character not destined for, and usable by, the opposing military force is in doubt when the seizure is in territorial waters rather than on land. But receipts or payments are necessary and the customary laws of warfare require humane treatment of crews of the detained vessels.

A civil war is not always conducted, as were the American and Spanish Civil Wars, with an increasing degree of intensity. Usually, the strength of the insurgents will advance and recede. The scope of their activities will increase and diminish. Their leaders will change and their political responsibility will vary. The so-called *de facto* state of belligerency of the insurgents will wax and wane. Insurgents who have been extended belligerent recognition by another state may be reduced to the status and political responsibility of bandits.

From the point of view of a "bystander" state, with respect to requisitions of property of its citizens by either the *de jure* government or insurgents, it is reasonable to invoke the customary laws of war as expressed or influenced by the Hague and Geneva Conventions. There is no requirement that the "bystander" state, to seek these minimum property safeguards, bring into operation its own neutrality laws and expose itself to an exercise of belligerent rights upon the high seas and to a possible charge of intervention by recognizing either the belligerency of the insurgents or a "state" of belligerency.

Application of Principles to Seizures by Nuevan Officials

The diplomatic practice of the United States recognizes the expropriatory power of the *de jure* government of a state which is in

fact in physical control of a portion of its territory over all objects, movable and immovable, found within that portion, except property owned by the United States.¹²⁸ For such public property the United States may assert a claim of sovereign immunity.

The expropriation of the vessels and lumber by the *de jure* government of Nueva may be founded upon a general right, such as that usually asserted in general nationalizations of property, often said to flow "from the sovereignty of states over their internal affairs."¹²⁹ As stated by Secretary of State Hull to the Mexican Ambassador in 1939:¹³⁰

My Government has frequently asserted the right of all countries freely to determine their own social, agrarian and industrial problems. This right includes the sovereign right of any government to expropriate private property within its borders in furtherance of public purposes.

The expropriation also may be founded upon a more particularized power to seize property for public use in an emergency. This power also has been recognized repeatedly by the United States.¹³¹

With respect to the seizure of the three merchant vessels, *Harp*, *West Wind* and *Cypress*, it may be arguable that they are temporarily within Nuevan territorial waters and have insufficient connection with the territory, and thus cannot be taken.¹³² This position had some support in the law of "angary." It appears no longer to be the practice under the modern law of requisitions applied in World Wars I and II. The prevailing present opinion is that a vessel may be requisitioned in an emergency if it enters port voluntarily.¹³³

¹²⁸ See Friedman, *Expropriation in International Law*, 134-135 (1953).

¹²⁹ See White, *Nationalization of Foreign Property*, 4 (1961).

¹³⁰ 32 *A.J.I.L.* (Supp., 1938), 181, 182. Cited in White, *supra*.

¹³¹ III Hyde, *International Law*, 1758-1772 (1947).

¹³² Friedman, for example, writes:

By customary international law the right of angary is excluded in certain cases which clearly show that, being a variant of expropriation, it may only be exercised in respect of property having a connection with the particular territory. It has no application to ships in transit in foreign ports not to ships under repair, but it does apply to ships which by their prolonged voluntary internment have finally become assimilated to the stable elements in the particular territory which are subject to the State's territorial sovereignty.

Friedman, *Expropriation in International Law*, 166 (1953).

¹³³ The *Harvard Draft Convention on the Right and Duties of Neutral States in Naval and Aerial War* accepts the element of "volitional" entry although it is pointed out that agreement upon the point is not general. See 33 *A.J.I.L.* (Supp. 2, 1939), 361, 368. See Castren, *The Present Law of War and Neutrality*, 511 (1954).

British courts have permitted requisitions of vessels and property seized on the high seas and brought in for adjudication.¹³⁴ The Court of King's Bench once permitted requisition of a neutral cargo brought into a British port by a British vessel against the will of the owner of the property.¹³⁵

Injecting an element of volitional entry into the conditions for requisition seems intended to preclude the practice of requisitioning vessels brought into port ostensibly for a search when a search can be conducted thoroughly and safely on the high seas. As pointed out, there is no objection to requisitioning a vessel or cargo in the custody of a prize court when there is a real issue to be tried and the procedure is not a ruse to facilitate the requisition.¹³⁶

Volition cannot, on the other hand, be relied upon as the basis for an effective argument to oppose requisitions. A few publicists take the position that a vessel which enters a port in distress cannot be requisitioned.¹³⁷ However, the emergency of the requisitioning state might clearly outweigh the privilege of the victim driven in by *force majeure*. There is scant authority upon which an exception for distress may be based.¹³⁸ It may be possible to argue that only property voluntarily submitted to the jurisdiction of the state can be requisitioned. The argument might be extended by claiming immu-

¹³⁴ The leading case is *The Zamora* /1916/ 2 A.C. 77 in which a Swedish vessel was brought in for search and then seized and subjected to adjudication on the ground that it carried contraband copper destined for the enemy. While the case was before the prize court, the Crown attempted to requisition the copper but this was not permitted on the theory that there "was no real question to be tried," so it would be improper not to order an immediate release. In addition to this feature, which frustrated the requisition, the Privy Council stated that the requisition of the vessel or goods must be needed urgently for defense or other national security matters and the matter was, in any event, one for the courts and not the executive to determine.

¹³⁵ *Commercial and Estates Company of Egypt v. Board of Trade* /1925/ 1 K.B. 271.

¹³⁶ See *The Zamora*, Fn. 134, *supra*.

¹³⁷ E.g., Friedman, *Expropriation in International Law*, 188-189 (1953).

¹³⁸ In the *Kate A. Hoff Case* (*United States v. Mexico*) *Opinions of The Commissioners*, 174 (1929), *Rebecca*, an American ship, entered Tampico in distress. Her master was arrested for bringing goods into a Mexican port without proper papers and was assessed triple damages against the merchandise on the vessel. When he failed to pay, *Rebecca* and its cargo were sold under a court order.

The Commission made an award in favor of the owners. Although the case can be explained simply upon the principle that a vessel in distress is exempt from the local customs laws, it may be argued that the case stands for the broader proposition that a vessel in distress cannot be expropriated for any reason.

nity when the volitional entry was prior to the emergency or in ignorance of an existing emergency.

These arguments are tenuous and are significantly weakened by the practice of requisitioning large numbers of idle vessels by the United States, Britain and Italy during World War I and by the United States and Britain in World War II.¹³⁹ It is not likely these arguments will bear close judicial scrutiny or will appeal to an army officer confronted by an insurrection, such as the one who has issued the requisition order in Nueva.

At least one writer takes the position that the right of "angary" or the right of requisition can be exercised upon the high seas.¹⁴⁰ The basis for this position is obscure. The few instances in which such requisitions have occurred have given rise to no suggestion that such a principle has been accepted by states. The statement

¹³⁹ The United States, in 1918, requisitioned 87 Dutch vessels in American ports and in 1917 requisitioned Norwegian ships building in American yards. See Fn. 86, *supra*. England, France and Italy requisitioned Swedish and Dutch vessels in 1918 under similar circumstances.

Four warships under construction in British shipyards for Turkey were requisitioned by England while Turkey was neutral in 1914. The United States, before its entrance into World War II, requisitioned idle vessels in American waters. This was also done by other American republics.

50 U.S. Code 196 currently provides:

During any period in which vessels may be requisitioned under section 1242 of Title 46, the President is authorized and empowered through the Secretary of Commerce to purchase, or to requisition, or for any part of such period to charter or requisition the use of, or to take over the title to or possession of, for such use or disposition as he shall direct, any merchant vessel not owned by citizens of the United States which is lying idle in waters within the jurisdiction of the United States, including the Canal Zone, and which the President finds to be necessary to the National Defense. Just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of § 1242 of Title 46. * * *

Section 1242 of Title 46 of the United States Code, which applies to vessels owned by citizens, or under construction in the United States, and establishes the scheme of compensation, establishes as a condition of time:

whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President.

¹⁴⁰ II Oppenheim, *International Law*, 761, 765 (7th Ed., 1952). Fn. 3 at p. 761 points out that the almost unanimous opinion of writers is to the contrary.

Only two instances of attempted requisitions have been reported. *Helicon*, a Norwegian steamer, was halted in 1914 and coal requisitioned by a German cruiser. *Petrolite*, an American steamer, had food requisitioned by an Austrian submarine in 1915. In neither case were the requisitions claimed or admitted to be consistent with international law.

may be based upon the British practice of requisitioning vessels and cargo during prize adjudications or when brought in for search.¹⁴¹

Most publicists assume merchant vessels in innocent passage through territorial waters may be requisitioned or subjected to the right of "angary." This position also has little support in practice.¹⁴²

If the power of a state to requisition property of aliens is subject to any appreciable confines, some direct contact previously existing between the state and the property taken must be required. It is the essence of innocent passage that this contact, of an offensive nature at any rate, is lacking.

The current absence of general agreement concerning the extent of territorial waters, coupled with claims of contiguous zones, sometimes of an extravagant nature, may erode the doctrine that property may not be requisitioned on the high seas. Assuming requisitions may be made during emergencies, as determined by the requisitioning state, the absence of a generally accepted test for territorial seas may ultimately impose a heavy burden upon sea commerce.

Suggested Solution: Situation 4

Upon the assumption *Harp*, *West Wind* and *Cypress* entered the harbor of *Exaltacion* voluntarily, not having been forced in by Cortez or Salvaje naval units, the vessels, by the present United States practice and accepted international legal principles, are subject to requisition by the Cortez government. There is no requirement that the various conditions of the old law of "angary" be satisfied.

There must be an urgent requirement for use of the vessels in the emergency. This, in accordance with the United States position, is determined finally by the requisitioning government. The vessels must be within the jurisdiction of Nueva, which they clearly are. There must be compensation. The services of the officers and crews of these vessels cannot be requisitioned.

The principles applicable to requisition of the vessels are applicable to the lumber. The contact or connection between the lumber

¹⁴¹ Article 29 of the Declaration of London of 1909 suggests goods serving exclusively to aid the sick and wounded may be requisitioned on the high seas although not treated as contraband of war. The Declaration of London is not a treaty. The inference which may be drawn from Article 29 appears incompatible with the Hague and Geneva Conventions on the point. A detailed comment on the Oppenheim position appears in Colombos, *The International Law of the Sea*, 508-510 (4th Ed., 1959).

¹⁴² E.g., Castren, *Present Law of War and Neutrality*, 511 (1954).

and Nueva is clear. Fewer arguments can be developed to oppose the action of the army commander.

Nationals of Nueva may be required to continue their work in the yards. But the labor of United States citizens may be compelled only to the extent necessary to protect the property from loss or injury during an orderly turnover and to secure orderly accounts and inventories upon which a valuation of the property may be based.

The naval force will not, absent further orders, intervene to prevent the requisitions, but will report these acts by the Cortez Government and will take measures to insure that the requirements of the customary laws of warfare are met in establishing the responsibility of the Cortez Government for the requisitions and the value of the property taken.

These requirements are that the local army commander issue written orders in regular form directing the seizures and that he furnish to the custodians of the property detailed written receipts indicating the property requisitioned and the use for which it was requisitioned. Compensation or an agreement for compensation will not be required in advance, although a fair compensation must be paid within a reasonable time. The United States will take action other than military to insure that compensation is paid. Routine procedures for this purpose are probably established in the Treaty of Friendship and Commerce between Nueva and the United States and adequate sanctions to secure payment no doubt exist in foreign aid agreements to which the United States and Nueva are parties.¹⁴³

The case of requisition in regular form by a *de jure* or *de facto* government of a state is distinguishable from a case of a threat to property or lives when local law enforcement has broken down and the government would have doubtful responsibility for damage which United States citizens might sustain.

In the latter case international governmental procedures cannot be expected to operate with sufficient speed to prevent or minimize damage. This being the case, the individual state can act pending

¹⁴³ See Fn. 89, *supra*. The *Foreign Assistance Act of 1961* provides, for example,

No assistance shall be provided under this Act to the government of any country which is indebted to any United States citizen for goods or services furnished, where such citizen has exhausted available legal remedies and the debt is not denied or contested by such government.

Public Law 87-195, 87th Cong., 4 September 1961, section 620(c). The present trend in foreign aid bills is towards prompt denials of aid to countries which expropriate the property of United States citizens without adequate compensation. See Heffernan, *New York Times*, 10 June 1962, p. 1.

action by an appropriate international governmental organization, although action by such an organization should not be hindered or impeded.

In the former case the responsibility of the requisitioning government is clearly established in international law as are procedures by which compensation may be obtained. There is thus no need for action other than to insure that the proper foundation for a claim is laid.¹⁴⁴

¹⁴⁴ Suggested references which develop in greater detail the problems raised in *Situation 4* are Stone, *Legal Controls of International Conflict*, 436-441 (2d Ed., 1959); II Oppenheim, *International Law*, 759-766 (7th Ed., 1952); III Hyde, *International Law*, 1757-1772 (1947); Castren, *Present Law of War and Neutrality*, 509-513 (1954); Colombos, *International Law of the Sea*, 505-513 (4th Ed., 1959); McDougal and Feliciano, *Law and Minimum World Public Order*, 476 (Fn. 223), 818-824 (1961); Bullock, "Angary" 3 *Brit. Y.B. Int. L.*, 99 (1922-23); Feilchenfeld, *The International Economic Law of Belligerent Occupation*, 32-46, 50-51 (1942); Lauterpacht, "Angary and Requisition of Neutral Property," 27 *Brit. Y.B. Int. L.*, 455 (1950). A thoughtful survey of the problems of state responsibility involved and a draft convention on the subject appears in Sohn and Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens," 55 *A.J.I.L.*, 545 (1961).

CHAPTER IV

ECONOMIC WARFARE AS A PRIMARY POLICY DEVICE

INTRODUCTION

This Chapter illustrates economic warfare used “offensively” as a primary policy instrument. Major reliance is placed upon economic warfare in *Situations 5* and *6* to attain policy goals. The offensive role of economic warfare in *Situation 5* is to interrupt supply by one of our allies of insurgents in another state. The employment of intense forms of violence for this purpose is inadmissible because a basis for friendship of the target of economic action must be retained.

The offensive role of economic warfare in *Situation 6* is to counter and upset a planned attack upon the United States with biological weapons. In *Situation 6* naval and other military force is deployed to “quarantine” or “interdict” biological munitions and the means for their delivery.

Situation 5 concentrates upon basic elements of the “economic sortie.” Difficulties in manipulating foreign aid as an economic warfare measure are illustrated. National and international commodity controls are discussed and suggestions offered how economic sorties can be developed within the legal structure established for commodity trade and control.

Situation 6 illustrates “economic sortie” techniques using naval force in offensive economic warfare. Self-Defense and Collective Self-Defense arguments under Article 51 are examined and a scheme suggested for a standard of permissive coercive action in view of Articles 2(4) and 51 of the United Nations Charter.

The reader will find it helpful to review the discussion of “intervention” in *Situation 3*, Chapter III. The analysis of permissive coercion suggested is framed in the broader standard of permissive intervention developed in Chapter III.

Situation 6 contains a discussion of legal problems in the Cuban Quarantine of 1962. Selected comments upon legal features of the Quarantine are analyzed and discussed.

A. PLANNING THE ECONOMIC SORTIE: CONSIDERATIONS OF LEGAL STRATEGY

Situation 5

Twelve hours after delivery of the Nuevan ultimatum to the Antiokan foreign secretary, Nuevan intelligence officers report withdrawal of the Antiokan marines from the southwest coast of Nueva. The marines have been replaced by PDS units. These units are now removing supplies from the beaches and have landed other supplies from unidentified surface vessels, submarines or aircraft.

Supplies identified as Antiokan are food, medical supplies and equipment, and small arms ammunition. Containers of small arms, antitank and antipersonnel mines, and light artillery ammunition have been observed. There are a number of uncrated light antiaircraft missiles. These missiles bear ordnance markings of the Peoples Republic of Scythia. No Scythian surface vessels, submarines or aircraft in the area have been identified.

Our Minister to Nueva, now at his post, has persuaded Cortez to request a meeting of the Organ of Consultation (Council of Foreign Ministers) of the Organization of American States. Both Nueva and Antioka are members of the Organization.

Cortez has declared, however, that Antioka must cease supplying Salvaje or he will stop the supplies by force. He is gratified that Antiokan marines have been withdrawn, is prepared to accept this act as a partial response to his ultimatum, and will refrain from military action for a short time to determine whether Antioka will cease its "intervention."

The United States Minister reports Cortez is under heavy pressure by chauvinistic members of his cabinet to commence hostilities against Antioka immediately. He believes Cortez is anxious to avoid this diversion of his military strength. Both Cortez and the United States Minister are alarmed by reports that persons wearing the PDS armband but speaking Scythian are taking an active part in arming and training PDS personnel in the Luna Mountains.

Our Minister has recommended to the Department of State that action be taken to stop the flow of supplies from Antioka to Salvaje pending consideration of the Nuevan complaint by the Organ of Consultation of the OAS. While he acknowledges this may increase reliance by Salvaje on Scythia, he believes it important to bring Scythian support of Salvaje into the open as early as possible and to force Salvaje to requisition food from farmers in the Luna Mountain area. Since food supplies are short because of an extreme drought, he thinks this will alienate the farmers from Salvaje and favor the Cortez government.

After receiving this recommendation from our Minister to Nueva, the Department of State has instructed our Minister to Antioka to discuss the Nuevan charge with Marshal Gondomar, President of the Republic. Gondomar states if aid is being sent to Salvaje, this aid supports the Monroe Doctrine since it encourages Salvaje not to rely on aid from outside the Hemisphere.

In any event, the Marshal states, any aid Salvaje receives from Antioka comes from private sources. He cannot interfere with these because the Antiokan constitution, "one of the most liberal in the world" provides for absolute freedom in domestic and foreign trade.

Our Antiokan Minister reports most of the supplies to Salvaje are furnished by REVARMCO, an Antiokan corporation. Marshal Gondomar and his two sons own 75% of the common stock. The supplies are purchased by REVARMCO from Antiokan arsenals and depots on credit. They are then sold to Salvaje for gold.

The Minister believes Gondomar can quickly bring this trade to an end if he desires. Gondomar is regarded as friendly to the United States and has usually supported the United States in debates in the OAS.

You are commander of the United States Naval Base at Coloso, Antioka. The United States Minister to Antioka is now meeting with you and the heads of the Army, Navy and Air Force assistance missions to Antioka. The Minister wishes to analyze the situation and obtain your observations with a view to further talks with Marshal Gondomar and his report to the State Department.

You and the other consultants are aware that under the International Peace and Security Act of 1961¹ the United States expended \$10,000,000 in Antioka during the past fiscal year. It will expend an equal amount during the current fiscal year. These amounts include the cost of major items of military equipment, such as tanks and antiaircraft guns, as well as the cost of spare parts, maintenance and training of personnel.

A loan of \$12,000,000 has been made from the Development Loan Fund² to assist in the resettlement of workers, presently employed in the tin mining and smelting industry, into agriculture and various light industries. No development grants have been made for the current fiscal year, but a grant is under consideration for agricultural training in the public schools.

Tin concentrates and refined tin metal have been the major Antiokan exports since colonial days. During the past ten years, the

¹ 75 Stat. 434 (1961).

² *Act for International Development of 1961* section 201, 75 Stat. 424, 426 (1961).

United States has purchased approximately 60% of the total Antiokan production of tin concentrates per annum.

About 40% of this total production has been purchased in dollars. The remaining 20% has been obtained by barter pursuant to the Commodity Credit Corporation Charter³ and the Agricultural Trade and Assistance Act of 1954 as amended.⁴

Bolivia is the only other source of United States tin supply in the Western Hemisphere. The United States domestic production of tin concentrates is negligible; and tin is a strategic metal for which there is no adequate substitute in the construction of heavy-duty bearings.

The United States National or "strategic" stockpile now contains 341,000 long tons of tin ingot. Eight thousand long tons are in the Commodity Credit Corporation "Pipeline" stockpile. These amounts are 164,000 long tons in excess of projected strategic needs of the United States. The Congress has therefore authorized disposition of 50,000 long tons of tin ingot from the National stockpile.

None of this tin has been sold as of the time of the conference with the Minister. However, the projected sale has generated much publicity and has caused domestic and international concern among those interested in the tin market. The President of the United States has assured the President of Bolivia that tin dispositions authorized by Congress will be made in a manner which will not injure the Bolivian economy.⁵ Similar assurances have not been made to Marshal Gondomar.

Tin mining in Antioka is on a high-cost basis. The mines have not been mechanized appreciably. The three mining corporations, controlling $\frac{9}{10}$ ths of the Antiokan tin production, are controlled by Marshal Gondomar and his two sons through majority stock ownership.

Antioka has purchased most of its wheat and wheat flour from the United States and has bartered wheat for tin with the Commodity Credit Corporation. During the past year the United States exported to Antioka 900,000 tons of wheat out of a total export of 12,066,000 tons. Antioka also looks to the United States for most of its hard goods and textiles. Trade in these items amounted to about \$15,000,000 during the past year.

³ 63 Stat. 154 (1949) section 2 amending section 4(h) of the *Commodity Credit Corporation Charter Act*. The original charter act contained no reference to strategic and critical materials. 62 Stat. 1070 (1948).

⁴ 68 Stat. 494 (1954) section 303; 72 Stat. 1791 (1958) section 6.

⁵ 45 *Department of State Bulletin*, 772 (1961).

Antioka is a party to the International Tin Agreement of 1960.⁶ The United States is not a party. Both the United States and Antioka are parties to the International Wheat Agreement of 1962.⁷ The United States, Antioka and Nueva are members of the Organization of American States and are parties to the various treaties upon which this Organization is based. All are also parties to GATT and members of the United Nations Organization.

Our Minister to Antioka tells you he believes the National Security Council may recommend to the President economic action to secure cooperation by Marshal Gondomar in ending Antiokan aid to Salvaje. Due to your extensive service in the area and familiarity with Antiokan politics and economic affairs, the Minister solicits your recommendations concerning possible courses of action by the United States to bring to an end Antiokan intervention in Nuevan internal affairs. The Minister is especially interested in economic action, although other types of action will be considered during your conference. What course or courses of economic action will you recommend?

Discussion: Situation 5

1. *Tentative Analysis of Facts and Possible Techniques*

a. *INTELLIGENCE BARRIER*

The "intelligence barrier" is the major obstacle to be surmounted before an adequate plan of economic action can be formulated. The end to be sought is amply clear. The United States desires Antioka to police the commercial transactions in which persons within its territory play a part to insure trade with Salvaje ceases. The end desired is a condition of "no contact." This requires positive action by Antiokan authorities. The overall strategy of the United States resembles a reconnaissance in force directed against one enemy area to induce revelation of the enemy strength in another area not under attack.

An effort is to be made to preserve peace between Antioka and Nueva pending consideration of the Nuevan complaint by the Organ of Consultation of the Organization of American States. By the time of this consideration, it is also expected the magnitude of Scythian aid to Salvaje will be revealed.

None of these things can be accomplished with the speed and

⁶ See United States Tin Conference, 1960, *Summary of Proceedings*, E/CONF. 32/5, p. 25 *et seq.*

⁷ *TIAS* 5115 (1962).

finesse required to avoid a major disturbance of relations between Antioka and the United States unless United States policy makers know precisely: (1) who can make the decisions in Antioka required to produce and sustain the desired condition of "no contact" with Salvaje; and (2) the values to which these decision makers are likely to respond.

b. *SELECTING THE WEALTH WEAPON*

Once these facts are known, and our intelligence at this stage indicates Marshal Gondomar as the official who can make the basic "guideline" or "directory" decision to interrupt the contact with Salvaje through his control over his sons and REVARMCO, we will probably employ the technique described earlier in this book as an "economic sortie."

Although we are relatively sure economic warfare by "protracted harassment" will not be attempted, it is possible a wealth weapon will not be used. There is evidence Gondomar responds significantly to manipulations of the wealth value (he likes money); but we cannot be certain upon the information we now have about the form this response is likely to take.

Will he resist or will he accept our demand? This we cannot determine with any acceptable accuracy until we know more about Marshal Gondomar—his history, his current control over his political following, the other values at stake as Marshall Gondomar probably views them.

Before, during and after our economic sortie, we must depend upon a constant and accurate flow of intelligence. Without this flow and a reasonable expectation of its continuance, a wealth weapon should not be used because of the chance of catastrophic misdirection.

Assuming we can rely upon the facts we have—and obtain additional facts—our problem is to induce in Marshal Gondomar psychical disequilibrium or "a sense of being trapped." He must feel he has no alternative but to accept our demand.

This we will do by bringing clearly before the Marshal the decision we desire and indicating the probable points of our operations against his economic position. We will then proceed rapidly in our operations against the point at which he apprehends major injury and feels least able to defend.

It is not what he *can* do, but what he *thinks* he can do that counts in economic warfare by economic sortie. We must thus take full advantage of any existing apprehensions of detriment with which

the Marshal is troubled. These apprehensions should indicate the most remunerative points of attack.

It is not the shock of the unexpected which produces disequilibrium, as in applications of military force, but the rapid development of an anticipated event which enhances the intuitive pessimism of the individual concerned. The point demanded is conceded by the target upon the assumption that by doing this he can stabilize his position. The "intermediate" object in both economic and military warfare is a "psychological condition" of a critical decision maker. The ultimate object is acceptance of the victor's demand.

Four areas of possible economic action appear in the facts before the Conference:

(1) The military and general economic aid program is substantial. A withdrawal, increase or redirection of this aid may be possible and would be adaptable to the "economic sortie."

(2) Operations might be conducted against the Antiokan tin industry in which Marshal Gondomar has a direct and personal interest.

(3) Antioka has been relying upon wheat obtained by purchase and barter from the United States. Perhaps this supply could be cut off if other sources could be blocked.

(4) There is substantial trade in hard goods and textiles that may be interrupted or increased.

In addition to the possibilities for economic warfare mentioned in the facts there is an indefinite range of other possibilities. These might include interference with loans sought by Antioka; action against Antiokan assets in the United States; or a naval surface, subsurface and air blockade of Antioka or Nueva. With modifications in technique and an adequate flow of information, any of these devices can be shaped to an "economic sortie."

There are two criteria which an acceptable economic weapon must satisfy: (1) The weapon must be supportable by other techniques ranging from persuasive diplomatic devices to physical force (*Sustentive Range*). (2) Collateral repercussions through use of the wealth weapon must be suppressible (*Ambit of Arrest*). These criteria, in many instances, overlap. Both are aspects of the major desideratum of economy of force.

c. *SUSTENTIVE RANGE—AMBIT OF ARREST*

A wealth weapon, used as a primary policy device in economic warfare, is not an *exclusive* policy device. Once a basic "guideline" or "directory" decision is obtained by pressure upon Gondomar,

this decision becomes meaningful only when supported by "executorial" decisions for the period desired.⁸ In effect, the decision maker must be locked upon his course. Supporting the decision maker in obtaining the required executorial decisions is a vital part of this continuing direction.

The policy devices to secure this continuing direction can be tentatively projected at the time the primary wealth weapon is selected. When conditions produced by the use of the wealth weapon are analyzed, further action by the use of wealth or other weapons can then be determined precisely.

But care must be taken that the wealth weapon selected for initial use does not preclude supporting action to obtain the requisite executorial decisions or further guideline decisions. For example, if wealth pressure upon Gondomar results in resistance to him by his own party or a major political group within the country, he may be forced into a position in which he cannot call upon the United States for help without seriously disturbing his domestic political support.

*Marshall Mission to China:
Sustentive Range of Economic Policy*

A difficulty of this kind arose during the Marshall Mission to China in 1946. Although extensive American aid was necessary in China to rebuild its economy, and for this reason could not be delayed indefinitely,⁹ both President Truman and General Marshall held out economic assistance to the Generalissimo as an inducement both to reforms within the Kuomintang and to cooperation by the Nationalists in a viable truce with the Chinese Communists.

General Marshall considered no stable Nationalist Government possible without substantial popular support. This support he thought might be developed most rapidly by reforms within the Kuomintang. The General's instructions authorized him to state that a China disunited and torn by civil strife was not a proper place for American economic assistance or military aid.¹⁰

Extensive aid was given the Nationalist Government under Lend-Lease and commitments were honored to transport Nationalist troops by air following the Japanese surrender. UNRRA, to which the

⁸ "Executorial" is used in the sense of any decision required to execute a policy and therefore described an area broader than that of the "administrative" decision, including judicial decisions as well as decisions in informal groups affected by the basic decision.

⁹ See 15 *Department of State Bulletin*, 34 (1946).

¹⁰ *United States Relations with China*, 132 (Department of State Publication 3573) (1949).

United States was the major contributor, gave substantial aid to the Chinese in 1945 and 1946. But General Marshall opposed credits by the Export-Import Bank. He did not recommend these until, by early 1946, the outlook for a peaceful settlement of the Nationalist-Communist conflict appeared promising.¹¹

The Export-Import Bank ultimately granted \$82,800,000 in credits to the Nationalists. Upon the further recommendation of General Marshall, the Bank earmarked \$500,000,000 of its funds for China, although implementing agreements were never made.

In the Lend-Lease Pipeline Agreement, the United States permitted delivery to the Nationalist Government on long-term credits of civilian-type equipment and supplies contracted under the Lend-Lease program but undelivered on V-J Day. Fifty-one million seven hundred thousand dollars in equipment and supplies were covered. There was also minor technical collaboration in agriculture and forestry.

An aid program of even this limited scope could be played upon both by Communists and Kuomintang extremists to obstruct the efforts of General Marshall. Both sides could cultivate the xenophobic and antiwestern bias of large segments of the Chinese to block both reforms in the Kuomintang and reciprocal concessions by Nationalists and Communists to implement the truce. As stated by the Department of State:¹²

The Chinese Communists professed to regard measures of aid to China and official statements in Washington as proving their contention that American economic and military support to the Chinese Government would continue to be given irrespective of whether the National Government offered the Communists a fair and reasonable basis for settlement of military and political differences. The Communists maintained that new legislation intended to aid China, which was then under consideration by the United States Congress, was reinforcing the National Government's tendency to deal with the Communists by force and was thus contributing to all-out civil war. * * * (The legislation concerned a military advisory group to act in accordance with the military reorganization agreement of 25 February 1946) * * *

At the same time some reactionary Kuomintang elements in inner government circles were utilizing American measures as a basis for pressing the Generalissimo to push forward with a plan of extermination against the Communists. Yet these and

¹¹ *Ibid.*, 226.

¹² *Ibid.*, 170-171.

other Kuomintang extremists appeared to be joining in anti-American agitation on the grounds that American economic pressure was causing American imports to displace Chinese products, bankrupt Chinese industrialists and prevent Chinese recovery.

These Kuomintang groups were also antagonistic to the restraint exercised by General Marshall and his assistants on the National Government with regard to an anti-Communist military campaign and were even using the Communist line against American intervention in pursuance of their aim to free the National Government from any American impediment to drastic anti-Communist action. The agitation and propaganda resulting from the activity of the different factions was being manifested in mass demonstrations, press campaigns and mob actions. * * *

On July 7 the Chinese Communist Party issued a manifesto containing a bitter attack on American policy toward China and a protest against what the Communist termed American military and financial aid to the National Government, which encouraged the civil-war policy of the Kuomintang. General Marshall had previously refrained from comment on such propaganda attacks, but the coincidence of events led him to inform General Chou En-lai of the serious blow to the negotiations such propaganda attacks represented, paralleling as they did similar propaganda releases from Moscow, and of the impossibility of his serving any useful purpose in mediation and in the termination of hostilities while such attacks continued. * * *

As General Marshall, in this hostile environment, attempted to hold together his disintegrating truce arrangement, the Communists meanwhile assuming a more aggressive posture by attacks upon American military personnel, his position was seriously jeopardized by the Sino-U.S. Surplus Property Agreement of 30 August 1946.

The Surplus Property Agreement was concluded in Shanghai between Mr. T. V. Soong, President of the Executive Yuan and Mr. Thomas B. McCabe, Special Assistant to the Secretary of State and Foreign Liquidation Commissioner. The United States agreed to sell to the Nationalists for \$205,000,000 small naval craft; communications, construction, electrical, medical and chemical equipment and supplies; shop and industrial machinery; vehicles of all types; and air force items. The property had a procurement value

of \$900,000,000 and was said to cover only items with a civilian end-use potential.¹³

Against the consideration of \$205,000,000 was set off \$150,000,000 due by the United States to China for supplies furnished United States forces during World War II. The remaining \$55,000,000 was to be paid in Chinese currency on a long-term basis. Twenty million dollars was to be used by the United States in cultural and educational activities in China. The balance of \$35,000,000 was to be used for acquisition of real property and other United States expenses in China. The United States also established a fund of \$30,000,000 to be used for shipping the surplus and technical services arising out of the transfer.

It is improbable that the Surplus Property Agreement was intended as an “economic sortie”—unless this was the Nationalist view of the matter. The surplus was located in India, China and upon numerous Pacific Islands where both storage facilities and adequate maintenance crews were lacking. Unless the surplus could be utilized promptly, it would be destroyed by the tropical climate and exposure.

A feeble effort appears to have been made to turn this exigency to diplomatic advantage. President Truman emphasized in an exchange of letters with the Generalissimo between August 10th and August 31st the necessity that Chinese internal problems be settled peacefully before extensive American aid could commence.¹⁴ Whether the exchange was initiated to coincide with the Agreement, or the Agreement signed to coincide with the exchange, cannot be determined from published materials. Although the Chinese were given 22 months within which to remove the surplus, there would be a sufficient logistical lag to prevent use of the property in any immediate assault against the Communists. At the same time the transfer would indicate to the Generalissimo the quality and quantity of the remaining “carrots” in the American bin. This was “weak fare” for “warfare”; but the Agreement, “sortie” or not, both blocked the truce negotiations and tended to neutralize the political impact of all American aid extended thereafter to the Nationalists until they were driven from the mainland in 1949.

As “economic warfare” the Agreement lacked sustenive range because it provided apparently definitive proof of a Communist

¹³ The writer has not had access to a verbatim copy of the Agreement. A fairly detailed summary of the provisions appears in 15 *Department of State Bulletin*, 548 (1946).

¹⁴ *United States Relations With China*, 652–654 (Department of State Publication 3573) (1949).

charge, difficult to refute in the minds of Chinese—the minds that counted, that the Generalissimo was entirely dependent upon American support and could never be more than a “puppet of American imperialists.” The Agreement also provided an apparent foundation for the charge that the United States actually had no interest in a viable truce but was buying time to build up Nationalist strength.

Typical of this propaganda, as it reached a fever pitch, was the passage in a speech by Chou En-lai, broadcast from Yen-an in January 1947:¹⁵

The people of the whole nation were welcoming President Truman's statement on China and General Marshall's mediation efforts in China a year ago, but not before long the true nature of the China policy of the American imperialists was exposed, and the high treason diplomacy of Chiang Kai-shek's regime was also fully unmasked.

Since then, from tens of thousands of students to the broad masses of residents in big cities all over China have been shouting these slogans: ‘U.S. Army quit China,’ ‘oppose American intervention in China's internal affairs,’ ‘oppose Quisling style diplomacy,’ ‘oppose the Sino-American trade treaty’; and the like * * *

And the Central Committee of the Chinese Communist Party stated in February 1947:¹⁶

* * * Since January 10, 1946, however, Chinese Kuomintang government has not only enacted many arbitrary domestic measures but also has many times singly conducted diplomatic negotiations of a serious nature with certain foreign governments. In the course of understandings, both oral and written, secret and open, without these agreements and understandings having been passed by the Political Consultative Conference or consulting opinion of this party and other parties and groups participating in Political Consultative Conference.

These diplomatic negotiations include loans from foreign governments, continuation of Lend-Lease, buying and accepting of munitions and surplus war materials, forming of treaties regarding special rights in commerce, navigation, aviation and other economic and legal special rights.

These negotiations and agreements request or permit foreign land, sea and naval forces to be stationed in or operate on the seas, waterways, territories, and in the air of the country, and

¹⁵ *Ibid.*, 707.

¹⁶ *Ibid.*, 719.

to enter or occupy and jointly construct or make use of military bases and points strategic to the national defense. They furthermore request or permit foreign military and other personnel to participate in organization, training, transportation and military operations of land, air and naval forces of the country, and to become conversant with military and other state secrets of the country. They also permit such serious matters as foreign intervention in internal affairs.

These measures of the Chinese Kuomintang government are completely contrary to the will of the Chinese people and they have plunged and will continue to plunge China into civil war, reaction, national disgrace, loss of national rights, colonization and crisis of chaos and collapse. In order to rescue the motherland from this calamity, to protect national rights and interests and the dignity of the Political Consultative Conference, the Chinese Communist Party solemnly states: This party will not either now nor in the future recognize any foreign loans, any treaties which disgrace the country and strip away its rights, and any of the above mentioned agreements and understandings established by the Kuomintang government after January 10, 1946, nor will it recognize any future diplomatic negotiation of the same character which have not been passed by Political Consultative Conference or which have not obtained agreement of this party and other parties and groups participating in the Political Consultative Conference. * * *

A similar mixture of half truth and falsity was prepared and spread to embarrass General Marshall during the negotiations for the August 30th Agreement and thereafter. His position was made doubly difficult because on 29 July 1946 munitions exports had been embargoed from the United States to China and also in mid-August from the Pacific bases. This action was taken, apparently, to buttress General Marshall's neutral position as mediator, rather than as a form of pressure upon the Generalissimo and the Kuomintang leaders.¹⁷ The Surplus Property Agreement then gave the Communists a new propaganda foothold.

General Marshall appears to have taken rapid action in an effort to offset this propaganda opening given to the Reds. In the words of the State Department: ¹⁸

In view of continued Chinese Communist propaganda attacks on the surplus property agreement of August 30, 1946, General Marshall gave a very detailed explanation of this transaction

¹⁷ *Ibid.*, 355.

¹⁸ *Ibid.*, 180.

to the Communist Party representative. He pointed out that this transaction had been under discussion since the beginning of 1946 and had been almost settled at the time of General Marshall's departure for the United States in March. During his visit to the United States he had ironed out most of the difficulties involved and the failure to reach an agreement on this transaction in February had resulted from Chinese Government efforts to improve the terms. The alternative to completing an agreement with China for the sale of this surplus property was the immediate disposal of the property to other governments in the Far East or dumping it in the ocean, courses of action which would have deprived China of material of considerable importance in the economic rehabilitation of the country.

General Marshall continued that Chinese Communist propaganda had imputed to this transaction every evil purpose possible and that great harm had thus been done. He concluded that while he accepted this propaganda as inevitable, he was greatly disturbed when a proposal such as that for the informal Five-Man Committee was being destroyed as a result of such propaganda.

The Chinese Communist Party representatives, however, continued to be critical of the surplus property agreement on the grounds that items such as trucks, communications equipment and army rations and uniforms would be used for civil war purposes and other items would be sold on the market and the proceeds thereof expended for military purposes. * * *

The Agreement thus provided the Communists with a ready answer to resist influence by persuasive diplomatic techniques. Their punch in fact had been "telegraphed" by Stalin in his discussions with Secretary Byrnes in Moscow in December 1945. Stalin suggested that Chiang Kai-shek "would lose his influence if the Chinese people got the impression that he was depending on foreign troops."¹⁹

The United States, after demobilization, lacked adequate military forces to affect the issue in China decisively. Its remaining weapons were advice and economic aid. The advice was difficult to give and poorly received because of chauvinistic sentiment within the Kuomintang. The economic aid, massive as it later became, was considered by no one likely to affect the Nationalist-Communist contest. The battle at this time was one for the loyalties of the Chinese. This loyalty was either unaffected or repelled by the American assistance.

There were no rational alternatives open to the United States

¹⁹ Feis, *The China Tangle*, 427 (1953).

other than extending aid. But the effect of this aid had been effectively precluded by the antiforeign gambit placed in the hands of the Communists by the Surplus Property Agreement.

In testifying before an executive session of the Senate Foreign Relations Committee, General Marshall, then Secretary of State, discussing the proposed China Aid Act of 1948, put the matter succinctly:²⁰

We must be prepared to face the possibility that the present Chinese Government may not be successful in maintaining itself against the Communist forces or other opposition that may arise in China. Yet, from the foregoing, it can only be concluded that the present Government evidently cannot reduce the Chinese Communists to a completely negligible factor in China.

To achieve that objective in the immediate future it would be necessary for the United States to underwrite the Chinese Government's military effort, on a wide and probably constantly increasing scale, as well as the Chinese economy. The U.S. would have to be prepared virtually to take over the Chinese Government and administer its economic, military and governmental affairs.

Strong Chinese sensibilities regarding infringement of China's sovereignty, the intense feeling of nationalism among all Chinese and the unavailability of qualified American personnel in the large numbers required argue strongly against attempting any such solution.

It would be impossible to estimate the final cost of a course of action of this magnitude. It certainly would be a continuing operation for a long time to come. It would involve this Government in a continuing commitment from which it would be practically impossible to withdraw, and it would very probably involve grave consequences to this nation by making of China an arena of international conflict. An attempt to underwrite the Chinese economy and the Chinese Government's military effort represents a burden on the U.S. economy and a military responsibility which I cannot recommend as a course of action for this Government.

On the other hand we in the Executive Branch of the Government have an intense desire to help China. As a matter of fact, I have struggled and puzzled over the situation continuously since my return. Our trouble has been to find a course which we

²⁰ *United States Relations With China*, 382 (Department of State Publication 3573) (1949).

could reasonably justify before Congress on other than emotional grounds. * * *

Present developments make it unlikely, as previously indicated, that any amount of U.S. military or economic aid could make the present Chinese Government capable of re-establishing and then maintaining its control throughout all of China. * * *

*Peruvian Coup d'etat:
Ambit of Arrest*

As important as the criterion that a wealth weapon have sustenitive range, which the Surplus Property Agreement lacked, is the closely related criterion that side effects of the weapon be suppressible. This, as noted previously, is described as the "ambit of arrest" of effects of the weapon. These side effects are notoriously difficult to foresee in economic warfare.

All interaction stimulated by economic warfare is not susceptible to control. It is critical, however, that conditions precluding accomplishment of the goal of use of the wealth weapon be subject to influence.

An example of the difficulty in dealing with the ambit of arrest of an economic weapon is illustrated by the United States response to the Peruvian coup d'etat of 18 July 1962. Within a few hours after President Prado's overthrow was announced, the United States broke diplomatic relations with Peru and terminated all aid except a school lunch program. Within a month, on 17 August 1962, diplomatic relations were resumed and aid, other than the military programs, was restored. By this date the military regime was firmly in control, having survived a general strike and broken the voting power of the opposition APRA party.

No doubt motivated by a desire to regain the goodwill of the United States, the Junta gave President Prado his freedom when his term of office expired. Impartial presidential elections were promised in 1963 under a revised electoral law.

These were liberal gestures, but the Junta had declared these policies in substance shortly after it seized power. Economic pressure may have produced an unequivocal statement of these policies. But there seems little reason to suppose that the Junta ever intended to do other than carry out its original commitments.

The purposes sought by the United States in terminating aid to Peru were never stated with clarity in official press releases. News commentators were in some confusion concerning the matter.

Probably two objectives were sought: (1) Weakening the Junta

to permit its overthrow by the APRA general strike and (2) Demonstrating United States disapproval of military coups d'état directed against civilian governments elected by democratic processes.

No doubt the latter objective was partially achieved. However, a wholly convincing expression of disapproval would require *withholding* aid while the Junta held power, since a few months earlier aid had been restored to a civilian government supported by military officers who had overthrown President Frondizi of Argentina. The net psychological effect upon prospective military rebels seems to have been that of a precautionary rap upon the knuckles. But the first objective, if in fact overthrow of the Junta was an objective, was unattainable because the United States had no effective method to control side effects of the withdrawal of aid. There was no ambit of arrest of these effects.

These side effects stemmed principally from resistance within Peru to intrusion by the United States into its internal affairs. There was support to this resistance by leading Latin American states, including Argentina, Brazil and Mexico.

To carry through its Peruvian policy to the goal of overthrow of the Junta by nonviolent means would require moves by the United States against a substantial number of other Latin American countries. These moves might be by economic or other sanctions. In all likelihood such moves would have been inconsistent with the principles of the Alliance for Progress and probably also in conflict with the nonintervention provisions of treaties to which the United States is a party. Pragmatically, and legally as well, the United States was barred from containing the forces which its withdrawal of aid set in motion.

The prospect of military interference in the Peruvian elections of June 1962 had been evident for months before results of the elections were known. Military members of President Prado's cabinet had warned that the elections would be vitiated by fraud.

The facts upon which this apprehension of fraud rested, or the findings of fraud alleged by the military after the elections, were never publicized in the United States. It is reasonable to surmise, however, that the underlying difficulty was total incompatibility between the Peruvian military elite and the leaders of the APRA party.

APRA had been founded by Dr. Haya de la Torre, its presidential candidate in the elections of 1962. The party controlled the Peruvian Confederation of Labor.

In its early years, APRA had been dominated by Communists. It had engaged in two armed clashes with the Peruvian Army and

Navy, once at Trujillo in 1932, where a number of Army officers had been killed, and thereafter at Callao in 1948, where it fomented a naval mutiny. Although APRA at the time of the coup d'état in 1962 was reputed to be mildly socialistic and strongly anticommunist, the old leaders, such as Haya de la Torre, remained. The latter, in particular, was anathema to the generals and admirals of the Peruvian Armed Services.

There was little that the United States could do about this great gulf between APRA and the military services. However, United States policy makers appear to have been convinced that APRA was supported by a popular majority and would provide the best guarantee against a communist foothold in Peru. From press releases, it appears that Ambassador Loeb had informed certain Peruvian military leaders that a coup d'état would be opposed by United States sanctions.

When the votes were tallied some three weeks after the election, Dr. Haya de la Torre was found to have prevailed by about 14,000 votes over his nearest opponent, Belaunde, who had been supported by a number of influential military leaders. A third party, led by former President Odria, polled sufficient votes to swing the balance for or against APRA in the presidential election.

Under the Peruvian Constitution no presidential candidate was elected unless he polled more than one third of the votes cast. If no candidate polled the necessary one third, the election was thrown into the Peruvian Congress. There APRA could prevail unless Belaunde and Odria combined.

The center of power thus shifted to Odria, a retired general, who had outlawed APRA and bottled up Haya de la Torre for five years in the Colombian embassy in Lima during his earlier term in office as President. Surprisingly, although Odria's Social Christian Party had substantial support from certain labor unions, discussions commenced between Odria and APRA leaders with a view to withdrawal of Haya de la Torre and a substitution of Odria for the Presidency.

Influential military leaders opposed this alliance. For this and other reasons the discussions broke down.

The Odria-APRA discussions were the last clear chance to avoid a coup d'état. On 11 July the National Electoral Board rejected a petition by Belaunde to set aside the vote in critical La Libertad Department. The Board refused credence to military reports of irregularities in this Department in registration and voting.

When President Prado refused to set the elections aside, since he had no constitutional power to do this, the military Junta seized

control. The response of the United States followed within hours.

The withdrawal of aid came as a shock to the Junta, most of whom were well disposed towards the United States. There is no indication that a withdrawal of aid deflected them from their course in any way.

The Junta took steps to mend its breached relations with the United States. But because the Junta controlled communications within Peru, the military communications net extending into the most primitive communities, the withdrawal of aid could be turned to the advantage of the Junta.

Odria, who had advocated a constitutional approach to solve the election difficulty, now denounced the American intervention. He gave his tacit blessing to provisional government by the Junta, and played no small part by withdrawal of union support from APRA in breaking the general strike called against the Junta on 21 July.

By the end of July the nationalistic reaction had been such that APRA's voting power was temporarily broken. Business was returning to normal. Argentina and Brazil made gestures of support for the Junta; although other Latin American states, such as Venezuela and Chile, had broken diplomatic relations.

In the early days of August, the facts gradually became clear that the Junta did control Peru. The Junta was accepted by most Peruvians, was willing to honor its international obligations and planned to return the country to a civilian government after reforms in the election laws. Further economic pressure would be likely to push the military leaders into a form of Andean "Nasserism." Peru would be encouraged to seek trade outlets other than its traditional markets in the United States.

For these reasons, and perhaps others undisclosed, there was no effort to bring pressure by removal of the premium on Peruvian sugar sold in the United States market. This technique had been used earlier with good effect against General Trujillo of the Dominican Republic.

The motive underlying action by the United States was laudable. The election had been a fair one by Peruvian standards. The polling places were supervised by the military. The allegations of fraud were considered by a presumably unbiased constitutional Electoral Board and rejected.

But apart from the propriety of the object, or the prospect for its attainment by other means, the wealth technique used precluded attainment of the goal. Forces not subject to control by the United States generated by wealth pressure strengthened rather than weakened the regime assaulted.

2. *Choice of a Wealth Weapon to be Used Against Antioka*

a. *MANIPULATION OF ECONOMIC AND MILITARY ASSISTANCE*

Economic and Military Aid Programs

The economic and military aid to Antioka may be manipulated as a wealth weapon. Ten million dollars currently is being expended in Antioka as military assistance. A loan of \$12,000,000 has been made from the Development Loan Fund. How much of these amounts remain unexpended is unknown at the time of the Conference. A Development Grant is under consideration.

The domestic law of the United States permits the President to suspend or terminate economic and military foreign aid in his discretion.²¹ Under the *Foreign Assistance Act of 1961* as amended,²² the President controls the terms and conditions of Development Loans,²³ Development Grants²⁴ and Military Assistance.²⁵

With respect to Development Loans and Grants, including assistance rendered under the Alliance for Progress,²⁶ the President's authority clearly includes the power to determine the consistency of the aid activity with other development activities planned. He may also determine the extent to which the recipient government is responsive to the vital economic, political and social concerns of its people.²⁷

The Congress has stipulated Military Assistance will be furnished solely for the internal security of the country concerned; for its legitimate self-defense; to permit the recipient country to participate in regional or collective measures consistent with the Charter of the United Nations or collective measures requested by the United Nations to maintain or restore international peace and

²¹ *Foreign Assistance Act of 1961*, 75 Stat. 424, 444 (1961) section 617: "Assistance under any provision of this Act may, unless sooner terminated by the President, be terminated by concurrent resolution. * * *"

²² At the time of writing, amendments appear in the *Foreign Assistance Act of 1962*, 76 Stat. 255 (1962) and the *Foreign Assistance and Related Agencies Appropriation Act, 1962*, 75 Stat. 717 (1961).

²³ 75 Stat. 426 (1961) section 201(b).

²⁴ 75 Stat. 427 (1961) section 211(a).

²⁵ 75 Stat. 435 (1961) section 503.

²⁶ The Alliance for Progress appears as an amendment to the *Act for International Development of 1961* (Part 1 of the *Foreign Assistance Act of 1961*) in the *Foreign Assistance Act of 1962*, 76 Stat. 255, 257 (1962). The powers of the President with respect to assistance under the Alliance for Progress are as extensive as under the other aid laws.

²⁷ E.g., 75 Stat. 426 (1961) section 201(b) (4) (5).

security.²⁸ Defense articles cannot be furnished on a grant basis to any country at a cost in excess of \$3,000,000 per fiscal year unless the President determines, among other things, that the country conforms to the principles and purposes of the United Nations and the defense articles will be utilized by the country to maintain its own defensive strength and the defensive strength of the free world.²⁹

In each executive agreement made with a foreign state for Military Assistance, the Congress has required stipulations concerning the use and disposition of defense articles. For example, the Agreement between the United States and El Salvador contains the following clauses:³⁰

1. * * * The defense articles and defense services referred to above shall be used for internal security purposes and for the Defense of the Western Hemisphere in accordance with the Charter of the United Nations and the Inter-American Treaty of Reciprocal Assistance.

2. * * * El Salvador will not permit any use of defense articles and defense services furnished under this Agreement by anyone not an officer, employee or agent of the Government of the Republic of El Salvador.

3. * * * El Salvador will not transfer, or permit any officer, employee or agent of that country to transfer such defense articles and defense services by gift or otherwise.

4. * * * El Salvador will not, without the consent of the United States, use or permit the use of such defense articles and defense services for purposes other than those for which furnished.

5. * * * El Salvador will maintain the security of such defense articles and defense services, and will provide substantially the same degree of security protection afforded to such articles by the United States Government.

6. * * * El Salvador will, as the United States may require, permit continuous observation and review by, and furnish necessary information to, representatives of the United States with regard to the use of such defense articles and defense services. * * *

The General Agreement for Economic, Technical and Related

²⁸ 75 Stat. 436 (1961) section 505(a). Military Assistance provisions are contained in the *International Peace and Security Act of 1961* (Part II of the *Foreign Assistance Act of 1961*).

²⁹ 75 Stat. 436 (1961) section 406(b).

³⁰ TIAS 5040 (1962).

Assistance between El Salvador and the United States, also a fair example of the agreements negotiated by the United States for nonmilitary economic assistance, states in Article VI(2) :

All or any part of the program of assistance provided hereunder may, except as may otherwise be provided in arrangements agreed upon pursuant to Article I hereof, be terminated by either Government if that Government determines that because of changed conditions the continuation of such assistance is unnecessary or undesirable. The termination of such assistance under this provision may include the termination of deliveries of any commodities hereunder not yet delivered. * * * ³¹

A clause similar to this has been inserted in current agreements made pursuant to the Alliance for Progress.³²

In addition to his power to withdraw economic or military aid conferred by domestic law and reserved in the aid agreements, the military aid agreements being expressly subject to the provisions of the *Foreign Assistance Act of 1961*, the President has inherent power in the conduct of the foreign affairs of the United States, pursuant to Article II, section 2(2) of the United States Constitution, to terminate any aid program when proper management of the foreign affairs of the United States requires it.

The discretion in the President to increase economic or military aid to Antioka is not so plenary as his power of suspension or termination. He is certainly limited by the amounts appropriated by the Congress for foreign aid. Specific limits for certain classes of aid may also be imposed. For example, a limit of \$57,500,000 per fiscal year has been imposed by the Congress upon the total value of defense articles transferred by grant to all American Republics.³³

Apart from an absolute prohibition of assistance to the "present" government of Cuba * * */the Castro-Communist government/* * *, a matter not relevant to the considerations of the Conference, in *Situation 5*, there are only three absolute barriers to an increase in aid in the discretion of the President.

Aid cannot be given to a country unless the President determines the country is not dominated or controlled by the international Communist movement.³⁴

If a country is taken over by Communists, aid cannot be increased

³¹ *TIAS* 4971 (1961).

³² E.g., *Agreement Between United States and Dominican Republic*, *TIAS* 4936 (1962) Art. VII(2).

³³ 75 Stat. 438 (1961) section 511(a).

³⁴ 75 Stat. 445 (1961) section 620(b).

but must be terminated, no matter what the potential of a wealth weapon involving an increase in aid may be.

Aid is sharply restricted if a country receiving assistance under the *Foreign Assistance Act of 1961* nationalizes, expropriates or seizes property owned by a United States citizen or by a corporation, association or partnership in which a United States citizen has at least 50% beneficial ownership; or expropriates indirectly by methods such as discriminatory taxation; and then fails to take steps within six months to offer relief to the United States citizen suffering loss. The President must suspend the aid program to the country concerned until he is satisfied appropriate steps by the country to give relief to the citizen are being taken.³⁵ If he must suspend aid, he cannot increase or restore the aid until the requisite facts can be found.

Also no *monetary* assistance can be given to a government which will use the money to compensate owners of expropriated or nationalized property. If the President finds money diverted for this purpose, *no further aid* can be given under the *Foreign Assistance Act of 1961* until the amount diverted is refunded to the United States.³⁶

Other barriers in domestic law to an increase in aid are partial only and may be avoided if the President finds the increase in the national interest or necessary for the national security. Thus if the President determines that a Communist country is not controlled by the "international Communist conspiracy" and reports this to the Congress; and also finds and reports: (1) the assistance is vital to the security of the United States; and (2) the assistance will promote the independence of the recipient country from international communism; aid may be extended under the *Foreign Assistance Act of 1961*.³⁷

A country which furnishes assistance to the "present" * * */Castro-Communist/* * * government of Cuba may receive aid, and thus an increase in aid if necessary, if the President "determines that such assistance is in the national interest of the United States."³⁸

If a country is indebted to any United States citizen or person for goods or services furnished, the indebtedness arising under an unconditional guaranty of payment given by the government or its

³⁵ 76 Stat. 260 (1962) section 301(3) (new subsection "(e)" to section 620 of the *Foreign Assistance Act of 1961*).

³⁶ *Ibid.*, (new subsection "(g)" to section 620 of the *Foreign Assistance Act of 1961*).

³⁷ *Ibid.*, (new subsection "(f)" to section 620 of the *Foreign Assistance Act of 1961*).

³⁸ 75 Stat. 719 (1961) section 109; 76 Stat. 260 (1962) section 301(d)(1).

predecessor, the indebtedness not being denied, and the creditor having exhausted his legal remedies, including arbitration, the President can nevertheless extend aid if he finds that a denial of aid would be "contrary to the national security."³⁹

*Possible Uses of Economic and Military
Aid Programs in Economic Warfare*

It is a fair assumption that aid agreements with Antioka have clauses similar to those in the economic and military aid agreements with El Salvador. There would thus seem no obstacle in either domestic or international law to a suspension, reduction or termination of any feature of the current aid program.

The economic aid agreement is terminable. The military aid agreement is subject to the terms of the *Foreign Assistance Act of 1961*. Furthermore, our intelligence services may discover Gondomar has delivered to Salvaje defense articles received from the United States in violation of the Agreement.

Also, if an increase in aid to Antioka should appear a desirable method for interrupting aid to Salvaje by Antioka, there is nothing except a limit on appropriations by Congress to prevent this increase. Antioka is not controlled by the international Communist movement. It has not nationalized or expropriated property of United States citizens nor has it refused to pay guaranteed debts to them based upon goods and services rendered.

Rewards to Antioka for violations of international law by intervening in Nuevan internal affairs may place a premium on legal "waywardness" by Gondomar and the members of his government. For this reason, an increase in aid is not a desirable course under the circumstances but cannot be excluded completely as an alternative.

Manipulating economic or military aid or both appears superficially as the most desirable method for pressure to interrupt the trade with Salvaje. The "legal" latitude for action, both in domestic and international law is broad. The aid program is amenable to rapid change. Quite certainly any change in the Program would have substantial impact upon Antiokan internal affairs. Some of the requisites for an effective "economic sortie" are met. But certain major requisites are missing.

*Inability to Direct Manipulations of
Foreign Aid: Delayed Reaction*

The first requisite missing is susceptibility to direction. If our

³⁹ 76 Stat. 260 (1962) section 301(d)(2).

estimates of Gondomar's power to interrupt the aid to Salvaje are correct, our economic action should be "aimed" at Gondomar.

An "economic sortie" cannot be directed as one would aim a rifle or lay artillery. The direction of an economic sortie, to the extent that any analogy can be made to a weapon, resembles the direction by target stimulus, employed in the heat, light or noise seeking projectile or missile. The point of impact of the heat, light or noise seeking weapon depends upon configuration of the target area and activity within it.

In economic warfare, the impact point of the force developed by an economic weapon depends upon the value configuration of the target area or value structure of the group within which influence is sought. A wealth weapon must be chosen which will follow the value "channels" or create the kind of interaction that will result in psychical impact upon the target. This capability, like the missile directed by target stimulus, depends upon the weapon chosen. *Choice of the weapon is the key to direction.*

Within six months or a year, manipulation of the aid program might induce Gondomar to cut off assistance to Salvaje. No immediate response by Gondomar should be anticipated because the impact upon him would be secondary. The primary impact would be upon military personnel, businessmen, agricultural workers or miners within Antioka. These persons might then bring their influence to bear upon Gondomar to act as the United States demands in order to obtain restoration of the withheld aid. How quickly these indigenous influences could be brought to bear upon Gondomar depends upon the influence channels in Antioka through which pressure may be exerted; obstructions in these channels which Gondomar might place; and supporting measures, by economic measures or otherwise, which the United States might develop.

If Gondomar's political position is a strong one, his reaction to a withdrawal of aid is likely to be slow even though the pressure upon his people is great. Time is of the essence if Salvaje's military effort is to be weakened or Scythian support of Salvaje brought into the open before the meeting of the Organ of Consultation of the Organization of American States. More time might be expended in manipulating foreign aid than can be spared under the circumstances.

Even if a United States policy maker is prepared to wait until the secondary effect occurs, the intensity of impact is speculative because of difficulty in directing the thrust of the weapon. The impact might be slight if persons within Antioka are injured who have little influence upon Gondomar. A value loss to Antioka might

be produced without a compensating decision advantageous to hemisphere defense and security of the general community. It is also possible that once influence is brought to bear upon Gondomar, his political position will be so shaken by its intensity that any decision he makes in response to the United States demand will be rendered illusory.

*Limited Ambit of Arrest and Sustentive
Range in Foreign Aid Manipulations*

Manipulation of the aid program also suffers as an effective economic weapon from a limited ambit of arrest of side effects and a lack of sustentive range. These features, as previously indicated, are closely related.

Several questions should be considered concerning the ambit of arrest of side effects. Gondomar is now friendly toward the United States. Other problems between Antioka and the United States, perhaps more serious than the one now presented, will arise in the future.

To facilitate the solution of these problems, assuming Gondomar continues in power, a policy should be avoided which reduces the intensity of his expectations of indulgences to be derived from continued friendship with the United States. If Gondomar looks elsewhere for aid, what avenues for influence by Scythia in Antioka may be presented and what devices might the United States employ to close these avenues?

Will opportunities be presented to Communists or other indigenous radicals to aggrandize their power if economic and social distress within Antioka is increased by a suspension or termination of aid? If radical shifts of power occur within Antioka by a suspension or termination of aid, the United States may find itself in such a situation that the only technique available to moderate the rate of internal change is additional aid. Additional aid may accentuate existing political cleavages in Antioka. A powerful but increasingly isolated and economically dependent elite may be created upon which the policies of the United States must then be oriented.

The restricted sustentive range of manipulations of foreign aid in economic warfare is especially marked. This is due to the state of the domestic law concerning foreign aid; "reciprocal controls" which a recipient state can exert; and a "folk-way" expectation of economic aid flowing from centers of great productivity, such as the United States, the Soviet Union and the countries of Western Europe. This folk-way expectation has emerged as a postulate of an *obligation* to supply the "needs of the needy" upon which foreign

aid reasoning in both donor and recipient states tends to be founded.

Limitations Imposed By Domestic Law

Under the *Foreign Assistance Act of 1961* and its amendments there is danger in exerting intense pressure, by economic means or otherwise, upon a state, particularly a small one. A later extension or resumption of aid to the state may then be foreclosed unless the Congress expressly grants to the President the authority to extend or resume economic aid.

Withdrawals of foreign aid tend to exert much pressure upon a recipient state. The response of a small state threatened with economic pressure by a larger and more powerful antagonist tends to be a defense by wealth weapons. Those most conveniently at hand are devices, such as confiscation or discriminatory taxation, to deprive nationals of the larger and more powerful antagonist of their local assets. This was one response of the Castro Government in the early phases of the "Sugar Encounter" described in Chapter II.

By Section 620(e) of the *Foreign Assistance Act of 1961*, as amended in 1962, if the small state is forced to the extreme of expropriation as a defensive measure, the flexibility of the President in using foreign aid for further pressure is limited. The President cannot renew the aid until the expropriating state takes appropriate steps to discharge its obligations under international law to the injured United States citizen. He will have to go to Congress for the appropriate authority.

A similar problem arises concerning the statutory prohibition of aid to the government of a country dominated or controlled by the international Communist movement.⁴⁰ If pressure forces a state into the Communist orbit because the ambit of arrest of the side effects of a wealth weapon is restricted, efforts to retrieve the state as a free-world member by cajoling its government with foreign aid are precluded.

The President in such a case must use funds other than those appropriated in the *Foreign Assistance Act of 1961* as amended. Alternatively he might go to the Congress for increased authority; rely upon a wealth weapon other than foreign aid; utilize some other coercive or persuasive device; or simply write off the state as a member of the free world and the property of United States citizens in that state with it.

⁴⁰ 75 Stat. 445 (1961) section 620(b).

A technique offering a degree of sustentive range in the manipulation of foreign aid is to "lead" with an "indulgence" or aid increase. The aid increase can then be coupled by a withdrawal of the aid to secure the desired decision. A lack of sustentive range appears with the withdrawal. A "lead" with an increase in foreign aid to Antioka would appear unwise if Gondomar in fact is the decision maker to be influenced.

Reciprocal Control in Foreign Aid

The element of "reciprocal control," which reduces the sustentive range of withdrawals of foreign aid, has been considered by Professor George Liska.⁴¹ Professor Liska views foreign aid as a contest between the Soviet Union and the United States for the allegiance of uncommitted countries by influencing the processes controlling the future institutions of the target states.⁴² This perspective is widely shared.

An ideal foreign aid relationship, as Professor Liska sees it, is one in which "the needs and demands of donor and recipient * * */are/* * * neutralized whenever the caliber of their interests are comparable. * * *"⁴³ This balance, he thinks, is not maintained because the controls exercised by the recipient states often tend to be more effective than the controls maintained by the United States.

The reciprocal controls by the recipient, as described by Liska, are usually conscious maximizations of the side effects of a wealth weapon used against the recipient. In Antioka Gondomar might point to the undesirable alternatives if his power is weakened by a withdrawal of foreign aid. Castro-Communist elements almost certainly are active in his country. Weakening Gondomar may enhance the relative strength of the Castro-Communists.

He may, as did the Peruvian leaders in 1962, suggest reorientation of Antiokan trade. His country now relies upon the United States for wheat, textiles and hard goods. These can be obtained elsewhere. A flow of dollars to Antioka means a flow of dollars to United States agriculture and industry so long as this trade pattern is maintained.

Perhaps Gondomar might threaten recourse to Scythia as a substitute for discontinued aid from the United States. While consumer goods furnished by Scythia may be below the standard maintained by the United States, its military hardware may be as

⁴¹ Liska, *The New Statecraft*, 19-23 (1960).

⁴² *Ibid.*, 4-5.

⁴³ *Ibid.*, 32.

satisfactory and its military advisors as good as those the United States can provide.

Counterpressures of this sort have critical political force in the United States. Foreign aid cannot be interrupted without publicity; and counterpublicity of threatened countermeasures may prevent supporting action of any sort because of activity by stimulated pressure groups within the United States.

Folk-Way Expectation of Aid: "Neofeudalism"

The folk-way expectation of aid flowing from centers of great productivity, discussed in Chapter I of this book, cannot be said to have reached a threshold of expression as a protolegal international institution. That it may cross this threshold within the present century is a distinct possibility.

There are not many instances, whether in the family, private charitable relationships, public charitable relationships, or extended foreign aid programs, in which constant repetition of an indulgence is not eventually regarded as a matter of right by the donee and an obligation of the donor. With respect to foreign aid, the process is much the same as that observed in domestic systems of law when a legal prescription becomes supported by nonlegal conduct patterns. Ethical norms are as easily created by law as law is developed in response to changing ethical norms.

An extensive prolongation of aid to a state produces institutions and conduct patterns based upon the flow of assistance. Especially when aid has been extended to encourage the creation of nonviable states, by the prevailing judgment in the Free World it appears "ethically" wrong to interrupt this aid suddenly. This judgment may well have molded attitudes concerning the interruption of aid to a viable state as well.

While the donor of aid is legally free to withdraw it for coercion or convenience, it is not ethically free to do so. The consequences of the ethical breach must be considered. These consequences may range from attriting domestic support for an economic warfare program to a total lack of foreign support from other states.

Withdrawing United States aid to Peru in 1962 initially had domestic approval. This approval diffused as press reports emphasized the suddenness and force of the withdrawal and the surprise of the military leaders at termination of the aid. The Western Hemisphere states supporting the United States were those which apprehended military coups d'état and hoped to avert these by insuring the success of the United States action. Other states of the Free World were neutral or watched for an opportunity

to divert Peruvian trade from the United States. The Communist dominated political parties of Peru hoped to benefit by economic and social distress which termination of the aid might produce; and no doubt would have done so with the assistance of Castro-Communist Cuba or the Soviet Union had pressure by the United States been maintained.

Whether further action by the United States against the Junta would have received general political support in the United States in August 1962 is debatable. That few allies of the United States could be induced to join in punitive action against the Junta is evident.

3. *Exploitation of Trade in Tin, Wheat, Textiles and Hard Goods*

Perhaps the most fruitful approach to force a decision by Gondomar to interrupt trade with Salvaje is to exploit the trade pattern of Antioka with the United States or with other countries. The most effective point of attack appears to be upon the tin industry of Antioka because an advantage or detriment offered here will affect Gondomar directly due to his personal interest in the production and sale of Antiokan tin.

While tin appears to be the only major export from Antioka to the United States, there is no significant trade advantage to be offered with respect to this commodity other than a premium or subsidy above the world price. This premium or subsidy would require action by Congress. The time available precludes the delay Congressional action would require.

There is a tendency to overproduce tin in the world market. This is due principally to the mechanization of tin mining. There is not, however, the same tendency to fluctuations in production encountered in agricultural commodities.

There is a marked fluctuation in the *consumption* of tin. Tin consumption is highly sensitive to changes in the level of business activity. The consumption of tin is closely linked to steel consumption. Both metals are used in all important tin applications.

Tin is also price "inelastic." Fluctuating prices in tin have little effect on the consumption rate, although the consumption rate affects the price of tin.

Due to the demand for price stability in the world tin market, there has developed, as in the case of sugar, an international commodity agreement, the latest being the International Tin Agreement of 1960.⁴⁴ An International Tin Council established under this agreement, with its seat in London, revises floor and ceiling prices

⁴⁴ United Nations Tin Conference, 1960, *Summary of Proceedings*, C/CONF. 32/5, p. 25.

established initially in the agreement, determines exportable quantities of tin from producing countries, and maintains a buffer stock for the contribution and withdrawal of tin to maintain a stable market price. The Manager of the buffer stock buys, sells and maintains stocks of tin in accordance with detailed criteria stated in the agreement.

United States refined tin imports are fairly constant. The imports fluctuate because of interruptions in steel production, such as those caused by strikes. Secondary tin, recovered from scrap, accounts for about one third of the tin consumption in the United States. This use of secondary tin, coupled with a trend to the use of paper and plastic packaging suitable for deep freeze storage, will probably maintain a constant level.

The demand for refined tin may increase. In a military emergency, large quantities of tin are consumed. The United States has only one tin smelter, at Texas City, Texas, once owned and operated by the United States Government but now in the hands of private owners. This smelter accounts for imports of cassiterite or tin ore into the United States.

While tin can be stored easily, United States manufacturers do not stockpile large quantities of tin because of its relatively high cost. Tin ingot and cassiterite are already on the "free" customs list. No tariff reduction is possible under the Trade Expansion Act of 1962.⁴⁵ Such a tariff reduction would require in any event an expenditure of more time than could be allowed to obtain the desired decision from Gondomar. Trade negotiations, the advice of the Tariff Commission and Executive Departments and a public hearing would be required before a reduction upon appropriate items could be put into effect.

Perhaps technical assistance or economic aid could be furnished to enable Gondomar to lower the cost of production of tin and thus operate on the world market with an advantageous profit margin. Mechanizing the mines would reduce the labor force and increase the problem of unemployment. Such a policy would have to be reconciled with the policy supporting the Development Loan of \$12,000,000 to assist in resettlement of the tin workers. This loan might have to be increased.

Purchases of tin for dollars or barter by the Commodity Credit Corporation of wheat or some other agricultural product for tin at an increased rate for the national stockpiles currently seem out of the question. The stockpiles now contain a substantial surplus

⁴⁵ 76 Stat. 872 (1962).

of tin ingot and have been under close Congressional scrutiny. An increase of these holdings is excluded.

On the other hand, the stockpiled tin might be used to place pressure on Gondomar by dumping part of the surplus to restrict his market either in the United States or in other countries. This might be done to the extent that it does not conflict with treaties, executive agreements, or other international obligations of the United States and does not damage the economy of the United States or a country to which the United States is friendly.

Stockpiling Policy

The United States maintains four⁴⁶ stockpiles or "inventories" of reserved strategic and critical materials deposited in various warehouses and depots throughout the country. As of 31 December 1961, the acquisition cost of these materials was \$8,708,672,700 and the estimated market value was \$7,720,001,400.

The materials are in the custody of the General Services Administration. Basic policies concerning acquisition and disposition of the materials are made pursuant to acts of Congress by other offices and agencies.

Two of the stockpiles are subject to the policy control of the Office of Emergency Planning of the Executive Office of the President. These are the "National" or "Strategic" stockpile, the larger of the two, and the Defense Production Act (DPA) stockpile.

The National Stockpile is assembled and maintained pursuant to the Strategic and Critical Materials Stockpiling Act of 1946.⁴⁷ This stockpile is intended to obviate dependence by the United States upon overseas foreign sources for strategic or critical supplies during a limited or general war. A minimum stockpile objective is established for each stockpiled item upon the assumption that some imports will be available from overseas sources during a war. A maximum objective for each item is also established upon the assumption that overseas supplies are cut off but access exists to some supplies from nearby foreign sources. Military, atomic energy, defense support and critical civilian needs are included in the estimate. An emergency of three years is assumed.⁴⁸

⁴⁶ A fifth inventory, consisting wholly of tin, the remaining stock of tin refined while the United States operated the Texas City smelter, and held by the Federal Facilities Corporation, was liquidated in January 1962, and is not included in the estimates in this book.

⁴⁷ 60 Stat. 496 (1946). This law superseded the earlier stockpiling act passed in 1939.

⁴⁸ Until 1958 the estimated emergency was 5 years.

The Defense Production Act Stockpile (DPA Stockpile) is accumulated pursuant to the Defense Production Act of 1950.⁴⁹ While materials may be transferred from the DPA Stockpile to the National Stockpile if the President deems this action necessary in the public interest, the dominant Congressional intention in establishing the stockpile was to provide an incentive for the expansion of industrial capacity and raw materials sources through the purchase of materials.

Policies for the National and DPA Stockpiles are established by the Office of Emergency Planning in Defense Mobilization Order V-7. The policies set forth in this Order, and any future policy changes, are formulated with the advice of interested government agencies channeled through an Interdepartmental Material Advisory Committee (IMAC).

The Departments of Defense, State, Agriculture, Commerce and Interior, the General Services Administration, Agency for International Development and the National Aeronautics and Space Administration have representatives on IMAC. Observers attend from the Bureau of the Budget, the Atomic Energy Commission and the Small Business Administration. The Chairman of IMAC is from the Office of Emergency Planning.

Purchases for the National and DPA Stockpiles are made by the General Services Administration in accordance with plans of the Office of Emergency Planning. For the National Stockpile purchase program, the items and amounts are stated in detail in the plan, with an indication of the amounts to be purchased in each fiscal year, the total amount to be purchased and the number of years required. Defense Production Act Program directives are less specific, indicating only the funds available for a resource expansion program and criteria for purchases.

Withdrawals of materials from the National and DPA Stockpiles are also by the General Services Administration. The procedures are complex and are set forth both by Acts of Congress and in Defense Mobilization Order V-7 issued by the Office of Emergency Planning.

The President may order withdrawals from the National Stockpile when, in his judgment, this is necessary for the "common defense" or "in time of war or during a national emergency with respect to common defense proclaimed by the President." These withdrawals may be for use, sale, "or other disposition."⁵⁰

⁴⁹ 65 Stat. 801 (1950).

⁵⁰ 60 Stat. 598 (1946) section 5.

This authority has been delegated by the President to the Office of Emergency Planning, to be exercised by the Director of the Office in releasing materials "in such quantities, for such uses, and on such terms and conditions" as the Director determines "to be necessary in the interests of national defense."⁵¹ The Attorney General has ruled that this power does not include authority to release gem diamonds in exchange for industrial diamonds on economic grounds alone when the common defense is not involved.⁵²

Materials can be removed, however, to be upgraded or rotated with substituted materials to prevent loss through deterioration.

When material in the National Stockpile is determined to be excess because of a revised determination of projected need, there can be no disposition until the Office of Emergency Planning gives it approval. The operating plans for disposition are then prepared by the General Services Administration. Defense Mobilization Order V-7, paragraph 14, states that the Director of the Office of Emergency Planning will authorize the disposition when there can be avoided: serious disruption of the usual markets of producers, processors and consumers; adverse effects on the international interests of the United States or upon domestic employment and labor disputes; and loss to the United States.

If the removal from the stockpile is for a purpose other than direct use of a government agency, the Departments of Interior, Commerce, State, Agriculture, Defense, Labor and other government agencies and private industries concerned must be consulted. The Departments of State and Interior may be able to block the disposition if, within thirty days after consultation, they object to the plan. The disposition is halted if the Director of the Office of Emergency Planning concurs in the objection. If the Director does not concur, the matter must be referred to the President for decision.

When the Office of Emergency Planning directs disposition of excess property from the National Stockpile, notice must be published in the *Federal Register* and notice must also be given to the Congress and to the Armed Services Committees of each House. The notices must state the reason for the revised determination, the item and amount to be released, the plan for disposition and the date upon which the material will become available for sale or transfer. No disposition can be made until six months after the date of each notice; and then not until the Congress by joint resolution has consented to the disposition.

⁵¹ 20 *Federal Register* 7637 (Oct. 11, 1955) ; 23 *Federal Register* 5061 (July 1, 1958) ; 23 *Federal Register* 6971 (Sept. 8, 1958).

⁵² 41 *Op. Att. Gen.*, April 27, 1954.

Congressional consent is not required if the revised determination is because the material to be released is obsolescent, is of no further usefulness or has deteriorated. The other requirements, such as notices and time intervals, are retained.⁵³

Dispositions from the Defense Production Act Stockpile require no notice in the *Federal Register* or notice to the Congress. The consent of Congress is unnecessary and there is no waiting period. Public notice of the disposition is required by Defense Mobilization Order V-7, paragraph 15. This requirement is satisfied by a press release.

Other requirements are the same as for dispositions from the National Stockpile. If the materials are resold, rather than used by the government agencies which look to the DPA stockpile for critical and strategic materials which they consume directly, the materials cannot be sold for less than the current domestic market price.⁵⁴

A third inventory, the "Supplemental Stockpile" is controlled by the Department of Agriculture and the Office of Emergency Planning jointly. The Department of Agriculture determines the materials which go into the stockpile. These materials are obtained by the use of foreign currency acquired through the sale of surplus agricultural commodities pursuant to Section 104(b) of the Agricultural Trade Development and Assistance Act of 1954,⁵⁵ or by barter of surplus agricultural commodities pursuant to the Agricultural Act of 1956.⁵⁶

Strategic or other materials acquired for barter must be placed in the Supplemental Stockpile "unless acquired for the National stockpile * * * or for 'other purpose'." The "other purposes" are defined as "foreign economic or military aid or assistance programs, * * * offshore construction programs, or * * * the requirements of Government agencies."

Approximately 90% of the strategic and other materials acquired by the Department of Agriculture have been by barter. The Department is assisted in selecting the materials and in determining prices by a Supplemental Stockpile Advisory Committee, having representatives from the Office of Emergency Planning, Departments

⁵³ A convenient exposition of these procedures with a collection of most of the relevant statutes and regulations may be found in *Inquiry into the Strategic and Critical Material Stockpiles of the United States* (Hearings before the National Stockpile and Naval Petroleum Reserves Subcommittee of the Committee on Armed Services, U.S. Senate, 87th Cong., 2d Sess. Part 1, 1962).

⁵⁴ 64 Stat. 801 (1950) section 303; 65 Stat. 133 (1951) section 103(a).

⁵⁵ 68 Stat. 456 (1954).

⁵⁶ 70 Stat. 200 (1956) section 207.

of the Interior, Commerce, Treasury and State, the General Services Administration, Bureau of the Budget and Agency for International Development. The Department of Defense and Atomic Energy Commission have observers.

Removals of materials from the Supplementary Stockpile are subject to the same limitations as removals from the National Stockpile. No statute expressly authorizes the President to order transfers of materials from the Supplemental Stockpile to the National Stockpile, although this authority may be implied from Section 4(h) of the Charter of the Commodity Credit Corporation as amended in 1949.⁵⁷

This may be the only method of removal from the Supplemental Stockpile except for items determined obsolescent or obsolete.

Section 3(e) of the Strategic and Critical Materials Stockpiling Act ⁵⁸ has been interpreted to prevent authorizations by the Office of Emergency Planning for the disposition of materials determined to be in excess of needs. Section 3(e) refers to a "revised" determination. By the administrative view there can be no "revised" determination by the Office of Emergency Planning because the Department of Agriculture makes the initial determination to place the material in the stockpile.⁵⁹ Until this section is amended by the Congress or more liberally interpreted by the Office of Emergency Planning the Supplemental Stockpile appears to be a dead end for strategic and critical materials unless these are released by the President or the Office of Emergency Planning pursuant to the emergency power.

Until strategic or critical materials obtained by the Department of Agriculture reach the National or Supplemental Stockpiles, the items are carried in a fourth inventory, described as the Commodity Credit Corporation or "Pipeline" Stockpile. The Commodity Credit Corporation is a corporate agency within the Department of Agriculture and subject to the general supervision of the Secretary of Agriculture through a corporate board of directors and officers.

The powers conferred upon the Corporation to dispose of its property, including strategic and critical materials, are quite general. Critical and strategic materials acquired by the Corporation

⁵⁷ 63 Stat. 154 (1949) section 2 (amending section 4(h) of Commodity Credit Corporation Charter Act).

⁵⁸ 60 Stat. 496 (1946). This law superseded the earlier stockpiling act passed in 1939.

⁵⁹ See *Inquiry into the Strategic and Critical Materials Stockpiles of the United States* (Hearings Before the National Stockpile and Naval Petroleum Reserves Subcommittee of the Committee on Armed Services, U.S. Senate, 87th Cong., 2d Sess. Part 4, 1962), 1014-1015; 1351-1352.

by barter must be for the National Stockpile, the Supplemental Stockpile, for foreign economic or military aid or assistance programs, for offshore construction programs, or "to meet the requirements of government agencies."⁶⁰

There seems no legal obstacle to a release of items held in the "Pipeline" Stockpile upon Presidential order or simply when a "government agency" needs the materials and can reimburse the Commodity Credit Corporation. No Congressional action or waiting period need be involved nor need there be public notice of the release.

Currently available from the stockpiles are 58,000 long tons of refined tin ingot. The Congress has authorized disposition of 50,000 long tons of this amount from the National Stockpile.

With respect to tin from this stockpile, however, the President is committed not only to consultations with Bolivia and other tin producing countries before sale but also to a scheme of sale which will avoid depressing the international market price of tin.⁶¹ There is no similar commitment concerning the 8,000 long tons of refined

⁶⁰ Barter of agricultural commodities for strategic and other materials not subject to rapid deterioration commenced in 1950 pursuant to the 1949 amendment to the Commodity Credit Corporation Charter. 63 Stat. 154 (1949) section 2. About \$107,000,000 in strategic and critical materials were acquired between 1950 and 1954. The Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454 (usually called P.L. 480) created the Supplemental Stockpile as a place for deposit for materials received in exchange for foreign currencies. The Agricultural Act of 1956, 70 Stat. 200 (1956) section 206 authorized transfer of bartered materials to the Supplemental Stockpile. The general dispositive power of the Commodity Credit Corporation from the Pipeline Stockpile rests upon 73 Stat. 611 (1959) section 204 and 70 Stat. 200 (1956) section 206.

⁶¹ See 45 *Department of State Bulletin*, 772 (1961). The President's message to the President of Bolivia states in part:

* * * The course of action which we have suggested is the sale of small lots of tin over a period of several years. This tin would come from the 50,000 tons which we now have in excess of our strategic requirements. We do not intend to depress the price of tin through these sales; they would be initiated at a time of world-wide shortage and would have the effect of discouraging tin consumers from substituting other materials for their normal tin consumption. In this way we can protect the long-run stability and continued prosperity of the tin market. * * *

The United States commenced a trial plan for the disposition of a maximum 200 tons per week in September 1962. About 30 tons of this was used in foreign aid programs and about 10 tons for use by U.S. Government agencies.

In the disposition of the remaining weekly quota, GSA accepted only bids reasonably consistent with prevailing market prices and regulated sales to avoid depressing the market prices. After consultation with a delegation of the International Tin Council and major tin producing states the interim program was extended during the first quarter of 1963. See 47 *Department of State Bulletin*, 386 (1962); 47 *Department of State Bulletin*, 1012 (1962); 48 *Department of State Bulletin*, 182 (1963).

ingot in the Pipeline Stockpile. In a disposition of this surplus tin the Bolivian economy would have to be safeguarded.

Dumping Tin in Antiokan Markets

It is therefore possible to take advantage of the publicity and state of apprehension of tin producers stemming from the Congressional authorization for disposition of the 50,000 long tons of refined tin ingot in the National Stockpile by proposing to Gondomar that unless he ceases his supply of Salvaje all or part of the tin in the Pipeline Stockpile will be dumped in Antiokan tin markets. A proposal to dump this surplus tin only in the United States markets of Antioka should place sufficient pressure upon Gondomar to obtain the decision desired.

An unpublicized statement of intention, coupled with disclosure to Gondomar of the speed of action possible under United States law, are desirable for maximum effect. If the plan proposed to Gondomar must be executed to apply the requisite pressure, collateral action will then be necessary to protect the Bolivian economy and to avoid damage to the tin miners of Antioka.

The advantages in a plan of economic warfare involving dumping refined tin ingot from the Pipeline Stockpile are: (1) Speed, domestic law requiring no appreciable delay; (2) Direction, Gondomar's personal financial interests in the Antiokan tin industry being at stake; (3) Adequate ambit of arrest, the side effects of the sortie being subject to offset by the use of foreign aid; and (4) Adequate sustentive range, there being no apparent obstacle to further action which might be taken against Gondomar if the action contemplated proves ineffective.

Although the United States has cooperated with the International Tin Council in maintaining tin prices, the United States is not a party to the International Tin Agreement of 1960.⁶² In the "Sugar Encounter" with Cuba, discussed in Chapter II, freedom of action by the United States was restricted because of its participation in the International Sugar Agreement of 1948.⁶³

For example, if the United States were a party to the International Tin Agreement of 1960, it would be required to give six months' public notice before it disposed of a noncommercial stock of tin.⁶⁴ The requirement is to protect consumers and producers from avoidable disruption of their usual markets. A provision similar to this

⁶² E/CONF.32/5. Second International Tin Agreement, United Nations Tin Conference, *Summary of Proceedings* (1960) 25.

⁶³ 10 *TIAS* 2189 (1959).

⁶⁴ The Tin Council may consent to reduction of the notice period.

is incorporated in the United States domestic law for dispositions from the National Stockpile; but the United States has assumed no general international obligation to avoid rapid dispositions or to give advance notice of transfers of tin from all of its stockpiles. Had such an obligation been assumed, the speed required for an effective economic sortie against Gondomar probably could not be developed.

It is possible, of course, that if the United States were a party to the International Tin Agreement of 1960 an exception might be found to permit action with the necessary speed. Article XVI(1)(b) of the Tin Agreement, for example, permits a participating country to take any action "singly or with other countries" which it considers necessary to protect its essential security interests when such action "relates to traffic in arms, ammunition or implements of war. * * *"

In this instance action by the United States is to interrupt trade in military supplies between Antioka and an insurgent in Nueva by bringing pressure upon Gondomar who is the person who can make the decision to bring the traffic to an end. A strong argument may also be offered that the traffic in arms affects the essential security interests of the United States and other countries of the Western Hemisphere.

The existence of a viable International Tin Agreement, on the other hand, creates a market environment which favors action by the United States against Gondomar. The impact of action by the United States upon Gondomar may be reduced to a degree because if the action affects the world-market price to such an extent that the price falls within "the lower sector of the range between the floor and ceiling prices" established by the Agreement, the Manager of the buffer stock may buy cash tin on the London Metal Exchange.⁶⁵ The Tin Council can also establish "control periods" during which maximum export amounts are established in order to maintain prices.⁶⁶

Action of this nature pursuant to the Agreement may work to the advantage of Gondomar. At the same time, action by the United States is favored because the existence and effective operation of a price control regime will tend to dampen price repercussions other than in the United States markets of Antioka. The Agreement is a "cushion" which tends to extend the ambit of arrest of the side effects of manipulations of the tin trade in economic warfare.

⁶⁵ Second International Tin Agreement, Art. IX(2)(d). If the price is in the "middle sector of the range" as defined by the Agreement, the Manager cannot buy unless the Tin Council makes the decision.

⁶⁶ *Ibid.*, Art. VII(2)(a).

The GATT⁶⁷ does not appear to limit action by the United States to restrict the Antiokan tin market by disposing of all or part of the surplus tin in the Pipeline Stockpile. Currently there is no tariff or tax on tin, although if a discriminatory tax or tariff should be proposed as a measure to be taken against Gondomar, this action would have to be justified under one of the exceptions which GATT provides.⁶⁸

The only GATT provision concerning dumping commodities from a National Stockpile is contained in Article XX(11)(c). This provision is applicable to stockpile surpluses accumulated as a result of World War II, a deadline of January 1, 1951, being established for liquidation of these holdings, with a stipulation for extension of the time in certain cases. Tin accumulated during World War II is held in the National Stockpile; but the tin in the Pipeline Stockpile was acquired after World War II by the barter of surplus commodities.

The action which the United States, as a party to GATT, might take against the Marshall bears an analogy to the routine contemporary market operations of the "state trader." A state trader enjoys a competitive advantage over private rivals in foreign trade because of its ability to undersell.

Article XVII of GATT is the provision aimed at state trading enterprises. This obligates the state trader to "act in a manner consistent with the general principles of nondiscriminatory treatment" prescribed in the Agreement "for governmental measures affecting imports or exports by private traders." The state trader must also "make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of any other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."

The Interpretative Notes⁶⁹ state marketing boards engaged in purchasing or selling are subject to the provisions of Article XVII. Paragraph 2 of Article XVII states, however, that restrictions in the Article do not apply to imports of products for immediate or ultimate consumption in governmental use and not for resale or for use in the production of goods for sale.

Two criteria thus appear to condition application of Article XVII:

- (1) Is the state actively engaged in competition with private enter-

⁶⁷ 61 Stat. Part 5, A-11 (1947).

⁶⁸ *Ibid.*, Art. XX (General Exceptions); Art. XXI (Security Exceptions).

⁶⁹ 61 Stat. Part 5, A-89 (1947).

prise in the trade in question? (2) Was the commodity in question obtained to place it on the market in competition with private entrepreneurs? With respect to activity of the Commodity Credit Corporation in obtaining tin by barter for the Pipeline Stockpile, both questions must be answered in the negative. The tin in question was imported for governmental use, the bulk being received in barter for other commodities. The tin has become available for disposition only after a bona fide redetermination of the strategic requirements of the United States for this metal.

If GATT should be construed to apply to the measures contemplated against Gondomar, the United States might invoke the security exception upon which the exception in the International Tin Agreement was substantially modeled. This exception permits a contracting party to take action which it considers necessary for the protection of its essential security interests “* * * relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment * * *.”⁷⁰

If the United States proposes action to disrupt Gondomar’s market for tin in the United States, or undertakes this action with a view to interrupting the arms trade with Salvaje, there appears to be no violation of the Charter of the Organization of American States or of the Charter of the United Nations. Neither charter precludes all economic action of a coercive nature.

Although Article 16 of the OAS Charter prohibits the use of coercive measures of an economic character to force the will of another state, this “forcing” is prohibited only when “unilateral advantages” of any kind are sought. There is no prohibition of economic action to frustrate an intervention of the type prohibited in Article 15; and Gondomar is intervening in Nuevan internal affairs in violation of this Article.

A constriction of the market for Antiokan tin in the United States is a “peaceful” means of action, analogous as previously indicated to practices habitually employed by the “state trader.” The United

⁷⁰ 61 Stat. Part 5, A-63 (1947) Art. XXI. Other security demands excepted relate to fissionable materials or the materials from which they are derived, action taken in time of war or other emergency in international relations, and action taken pursuant to the obligations of a state under the UN Charter for the maintenance of international peace and security. It is possible that action by the United States against Gondomar might also be justified under the latter two exceptions. The “military establishment” mentioned in Article XXI(ii) is not further elaborated in the interpretative notes. There is nothing in the Article which clearly restricts the words to the “military establishment” of the state which takes action otherwise in violation of the GATT but permissible under the exception.

States action proposed against Gondomar is to secure "international peace, security and justice" rather than to endanger these aspirations as mentioned in Article 2(3) of the United Nations Charter. No threat or use of force is made against the territorial integrity or political independence of Antioka as mentioned in Article 2(4); and it is consistent with the purposes of the United Nations to maintain the status quo politically until a dispute of a peculiarly dangerous nature can be considered by the Organ of Consultation of the Organization of American States.

*Manipulation of Trade in
Wheat, Textiles and Hard Goods*

In contrast to the proposed manipulation of the Antiokan tin market in the United States, manipulations of the trade with Antioka in wheat, textiles and hard goods are subject to several of the difficulties observed in manipulations of foreign aid in economic warfare.

The effect upon the critical decision maker (Gondomar) may be indirect, the ultimate effect upon the Marshal requiring more time than can be reasonably considered for expenditure under the circumstances. A reduction in exports of wheat to Antioka, and possibly an embargo on other shipments as well, are likely to strike at consumer groups within Antioka lacking access to political channels through which Gondomar can be influenced.

A reduction in exports of textiles or hard goods might affect industrial interests in Antioka. The persons affected by this reduction would be likely to have more influence upon Gondomar than would agricultural, mining or industrial workers deprived of wheat. Gondomar might be affected personally by blocking trade in textiles or hard goods. But the impact of trade restrictions upon these articles clearly will have a delayed effect which manipulations of the Antiokan tin trade will avoid.

The ambit of arrest of the side effects of manipulations of the trade in wheat, textiles and hard goods also will be limited. No wave of sympathy is ever generated, and positive hostility is usually provoked, by denials of food to people who need it. When economic warfare is used as a secondary policy device (supporting the use of physical violence) denials of food to persons by means of a blockade or preemption of supplies are sometimes grudgingly tolerated. These food denials, on the other hand, are almost never forgotten and tend to taint interstate relations for generations.

When economic warfare is used as a primary policy device, the flow of food and medical supplies to a target state should not be manipulated. Humanitarian considerations are a sufficient justifica-

tion. But if a policy maker is not swayed by these, he may be persuaded by the threat of the future communications barrier which food denials tend to erect.

The side effects of manipulations of the trade in textiles and hard goods are likely to be paramount within the industrial establishment of the exporting state. While reductions in wheat exports may be compensated in the United States by government purchases of wheat surpluses, the impacts upon textile and hard goods industries when a foreign market is disturbed are likely to be severe.

It is difficult to maintain an internal stable price and income structure and regularly paced production when the government concerned does not also seek to avoid violent gyrations in foreign trade. The internal effect of violent external economic disturbance can be lessened when the internal economy is fully state controlled as in the Soviet Union. But where state control is partial, as in the United States, external economic disturbances, whether intended or not, disturb the internal economy of the acting state.

The sustenive range of economic action by manipulations of the trade in wheat, textiles and hard goods is also limited. If the trade in wheat is interrupted, Antioka may turn to the International Wheat Council for supplies of wheat pursuant to Article 11(1) of the International Wheat Agreement of 1962.⁷¹ This demand could be satisfied unless there was a significant international wheat shortage, although there might be a supply hiatus due to the shipment time from sources other than the United States. The wheat reserves in Antioka might be sufficient to bridge this time gap.

Antioka also might turn to the Soviet Union or Scythia for its trade in textiles and hard goods and ultimately reorient its markets. Gondomar could certainly bring pressure to bear upon American manufacturers denied access to Antiokan markets; and these persons in turn could bring force to bear upon the Executive Branch and Congress to erode an economic warfare policy designed to disrupt Gondomar's trade with Salvaje. Additional supporting action which appeared necessary against Gondomar might prove awkward because of this reciprocal pressure.

From a legal viewpoint, there are no domestic objections to manipulations of the trade in wheat, textiles or hard goods. This trade can be interrupted under the Export Control Act of 1949⁷² or under Section 5(b) of the Trading With the Enemy Act of 1917.⁷³ But the

⁷¹ *TIAS* 5115 (1962).

⁷² 63 Stat. 7 (1949).

⁷³ 40 Stat. 411 (1917); 54 Stat. 179 (1940). The Export Control and Trading With the Enemy Acts were discussed in detail in Chapter II.

United States may encounter an international legal obstacle in manipulating the trade in wheat.

Under the International Wheat Agreement of 1962,⁷⁴ to which the United States and Antioka are parties, datum quantities of wheat are established for each crop year by the International Wheat Council for each exporting state (the United States) with respect to all importing countries (Antioka). The International Wheat Council may, in its discretion, require exporting and importing countries to cooperate to insure the availability for purchase by importing countries after January 31st of each crop year of an amount of wheat equal to not less than 10% of the datum quantities of exporting countries for any crop year. Although the United States has votes as a member of the Council, it is not a free agent in manipulating its exports of wheat.

There is no security exception in the International Wheat Agreement of 1962 similar to the exception in the International Tin Agreement of 1960. The only provision relative to security permits an exporting or importing state to withdraw from the Agreement if it "considers its national security to be endangered by the outbreak of hostilities."⁷⁵ The state concerned must give thirty days written notice of its withdrawal to the United States or must apply to the International Wheat Council for a suspension of its obligations under the Agreement. The United States is depository state for ratifications, accessions and withdrawals.

The combined defects of indirection, limited ambit of arrest and limited sustentive range suggest manipulations of the trade with Antioka in wheat, textiles and hard goods may mature into a fruitless policy of protracted harassment. A policy of protracted harassment would induce no decision of the nature which Gondomar is desired to make; would expend too much time; might drive Antioka to other sources of supply; and might prove injurious to the economy of the United States. These alternatives on the whole appear less desirable than manipulations of foreign aid, and certainly appear less desirable than operations against the Antiokan tin market in the United States.

Suggested Solution: Situation 5

There should be no assumption that a wealth weapon is the most desirable policy device to induce Gondomar to interrupt his trade with Salvaje. But if a wealth weapon is selected, the first United States move should relate to the Antiokan tin market.

⁷⁴ *TIAS* 5115 (1962), Art. 17(5).

⁷⁵ *Ibid.*, Art. 36(7).

This appears to be the only area for wealth pressure in which the effect upon Marshal Gondomar will be immediate rather than indirect. A quick impact can therefore be anticipated. The existence of the Buffer Stock maintained pursuant to the International Tin Agreement of 1960 will insure a degree of price stability in the world market and provide an acceptable ambit of arrest of the side effects of use of the weapon contemplated. The sustenive range seems adequate, foreign aid manipulations in particular being available to follow-up action upon the tin market if supporting action becomes necessary.

As a first step in the program of economic warfare, Gondomar should be informed privately that his tin market in the United States will be disrupted unless he ceases his assistance to Salvaje. Facts should be placed before him to insure that he appreciates these features of his environment: (1) The current conditions of the world tin market; (2) The importance to him of his United States market; and (3) The speed with which United States officials can move to disturb his market under domestic and international law.

It is probable that Gondomar will cease his support of Saváje when he appreciates the directness and speed with which the United States is prepared to move. If, however, the Marshal does not make the desired decision promptly, refined tin ingot should be withdrawn from the Pipeline Stockpile and sold to his United States customers at prices below any the Marshal can offer.

The United States must be prepared to cease these withdrawals and sales on short notice and to support the economies of friendly countries injured by these sales. In aid to Antioka care should be taken to avoid compensating aid to Gondomar. Payments to the Commodity Credit Corporation for the tin withdrawn should be made from unearmarked funds appropriated for foreign aid and other purposes.

B. NAVAL INTERDICTION OF SUPPLY LINES IN SUPPORT OF DIPLOMATIC ACTION

Situation 6

After the conference in *Situation 5*, in which our Naval Commander at *Coloso* participated, our Minister to Antioka submitted his report and recommendation to the Department of State. Thereafter the Minister was instructed to request an immediate meeting with Marshal Gondomar.

On the day following this meeting, REVARMCO was dissolved by its stockholders. Its assets were sold by sealed bids. The Antiokan Government was sole bidder.

At its meeting requested by Cortez, the Council of the Organization of American States, acting provisionally as an Organ of Consultation, appointed an investigating committee for an inspection on the spot.

Members of this Committee and its staff were excluded by Salvaje from Luna Mountain areas occupied by the PDS Army. Based upon the only observations possible, the Committee reported no further activity by Gondomar in Nueva.

The Committee estimated Scythian personnel supporting PDS forces at approximately 1,000. Scythia was said to have placed much equipment, including 14 trawlers manned by Scythian personnel, at Salvaje's disposal.

During the Committee investigation, and while military action in Nueva was at a standstill, Cortez, in a radio and television address from *Dolores*, announced he and his Cabinet had resigned for the welfare of the people of Nueva and to avoid further internal conflict. He urged his listeners not to resist movement of the PDS forces to *Dolores*.

On the next day Salvaje flew to *Dolores* and took office as Provisional President. He promised future popular elections. Cortez and his Cabinet were arrested. Numerous officers of the Nuevan armed services have been dismissed.

Due to the puzzling circumstances of the Cortez collapse, our Minister to Nueva was recalled for consultation. He has presented to the National Security Council the following facts.

On 25 November, shortly before the resignation of Cortez, General Valens, a Nuevan national, recently returned from Scythia and now Chief of Staff of the PDS Army, met with the Nuevan Ministers of Defense and Health under a flag of truce. Valens informed these officials that Scythian biological warfare units supporting the PDS Army would commence action against Nuevan Armed Forces and the civilian population controlled by the Cortez Government. If Cortez and his Cabinet resigned by midnight, 27 November, and supported Salvaje's assumption of office as Provisional President no biological warfare would be commenced.

The two Ministers accompanied Valens to the Luna Mountain area. There they observed aerosolizing equipment emplaced in bomb-proof shelters and mounted on Scythian trawlers in adjacent waters; stockpiles of aerosolized pneumonic plague bacilli, sulfadiazine, respirators and protective clothing; and prisoners from the jail at *Patricio*, who had been exposed to aerosolized pneumonic plague bacilli.

The Ministers reported to Cortez. At a meeting of Cortez and his

Cabinet with the commanders of the Nuevan Armed Forces it was concluded that air strikes with conventional explosives could not destroy sufficient biological warfare munitions to forestall the threatened attack. Nuclear weapons were not available.

The weather forecast for three weeks favored a biological attack launched by aerosols from the Luna Mountains or adjacent coastal areas in the direction of *Dolores*. Supplies of sulfadiazine could not be obtained and distributed, nor could an immunization program be completed, in time to avoid massive casualties.

Under these circumstances, President Cortez and his Cabinet decided to capitulate and resign.

During this meeting with the United States Minister to Nueva, the National Security Council considered also these intelligence items derived from reliable sources.

(1) In return for support given him by Scythia, Salvaje has agreed to Scythian use of Farrago Island, a Nuevan possession fifteen miles off its coast, as a proving ground for biological munitions. He has also agreed to permit Scythia to stockpile biological munitions useful in economic warfare (against livestock and crops) in the Luna Mountains. These stockpiles are to remain under Scythian control.

(2) Experiments are being conducted by Scythia on Farrago with an aerosolized yellow fever virus. The aerosol technique bypasses the mosquito as a vector and permits effective use of the munition in temperate or cold climates in any season.

(3) Seven Scythian trawlers, equipped with aerosolizing nozzles, have been observed by naval air and submarine patrols conducting attack delivery maneuvers at ranges of from 250 to 300 miles off the Virginia and Maryland coasts. It is estimated that Scythia can deliver biological warfare materials in aerosols with favorable winds at ranges of from 500 to 600 miles.

(4) On 8 December, experiments were conducted by a Scythian trawler off Farrago with aerosolized Melioidosis-B. Melioidosis, caused by the bacillus *malleomyces pseudomallei*, is similar to glanders but has a higher fatality rate. Melioidosis was first observed in the Orient and approximately 400 cases have been reported since the disease was identified.

Melioidosis-B, a mutant of Melioidosis, was developed by Scythia for use against livestock in economic warfare. The 50% lethal dose (LD₅₀) is believed to be 23.5 bacilli. Death results in approximately six hours after infection.

The trawler delivered Melioidosis-B from an average range of five miles during a run of approximately ten miles. All sheep on Farrago, placed there for the experiment, received a lethal dose. Although Scythia had considered the lethal effect of Melioidosis-B limited to

livestock, one hundred and thirty Amerindians, the only humans on the Island, also died.

Aerosol delivered by the trawler was wind borne over parts of Nueva, Cases of Melioidosis-B in humans and livestock have been reported unofficially, although Salvaje has attempted to suppress this information. Antioka, also in the aerosol path, has reported several suspected cases of Melioidosis-B in humans and livestock to the Pan American Sanitary Bureau and the World Health Organization. Cultures taken from these suspected cases are being examined in the Pan American Zoonoses Center in Azul, Argentina.

Based on these facts, the President alerted the United States Public Health Service and the Department of Agriculture and ordered close naval surveillance of Scythian trawlers operating in the Caribbean and in waters off the eastern coast of the United States within biological striking range by wind-borne aerosols (600 miles).

During the month following this meeting of the National Security Council, United States intelligence agencies reported a regular and heavy flow of biological warfare equipment and personnel from Scythia to Nueva by sea and air. These shipments included pneumonic plague and Melioidosis-B biological warfare munitions.

Aerosolized yellow fever virus has been perfected by Scythia in Nueva and is now being stockpiled there. The Scythian biological warfare stockpiles, have been dispersed in caves and underground shelters and probably are secure against nuclear attack. These stockpiles remain under Scythian control. Forty-six Scythian trawlers, carrying aerosolizing equipment, now operate out of Nuevan ports.

On 16 May, Marshal Gondomar, President of Antioka, informed the Chairman of the Council of the Organization of American States that on the night of 10 May units of the Nuevan Navy, supported by Scythian biological warfare specialists, commenced biological warfare against Antioka by dispensing contaminated aerosols from surface vessels. Pneumonic plague, Melioidosis-B and yellow fever have thus far been unidentified. The presence of Nuevan vessels was detected by radar. No defensive action was taken because the attack was not discovered until massive outbreaks of the diseases occurred.

At the time of his message to the Chairman of the Council, Marshal Gondomar ordered the Antiokan air force to sink all Nuevan naval craft and Scythian trawlers within striking range by aerosols (600 miles) of Antioka. He requested the assistance of members of the Organization of American States to meet an armed attack pursuant to Article 3(2) of the Inter-American Treaty of Reciprocal Assistance (Rio Pact). He also requested an immediate meeting of the Organ of Consultation pursuant to Articles 3(2) and 6 of this Treaty.

The Council of the Organization of American States, acting provisionally as an Organ of Consultation, debated Marshal Gondomar's charge for six days. Salvaje has denied any attack with biological weapons was launched. Gondomar's charge has been confirmed by reports from Coloso, and Nuevan troops and landing craft have assembled in Nuevan ports.

Influential members of the Organization of American States believe the outbreaks of disease in Antioka may be due to Scythian experiments at Farrago or to Marshal Gondomar's own experiments, which he is believed to have undertaken. For this reason the Organ is not prepared to approve unilateral measures of military support for Antioka or collective measures under Article 2(2) of the Rio Pact.

The Organ also has failed to conclude under Article 6 that an aggression "which is not an armed attack" has occurred. A situation which might endanger the peace of America has been found. The Organ is thus prepared to call upon "the contending states to suspend hostilities and restore the status quo ante bellum."

Hostilities, in fact, are in a stalemate since all of the Antiokan aircraft which sortied against Nuevan naval units and Scythian trawlers have been destroyed. Marshal Gondomar is unwilling to risk his surface vessels and single submarine. Medical teams and supplies have been sent to Antioka by the United States and other members of the Organization of American States.

Under these circumstances, the President of the United States has received a letter from the President of Scythia, which states that Scythia, supporting Salvaje's demand for abandonment by the United States of its Naval Base at Coloso, is restraining with difficulty the Nuevan Navy from attacks upon the continental United States. Scythia cannot guarantee the effectiveness of these restraints so long as the threat to Nuevan security posed by the United States Naval Base at Coloso continues.

It is known Salvaje desires abandonment of the base at Coloso to insure the success of any attack which he launches against Antioka. The only threat which the Nuevan Navy could offer to the continental United States is a threat to attack with biological weapons. These weapons can be obtained only from Scythian personnel and can be delivered in substantial quantities only with Scythian equipment.

On 22 May, a Scythian dispatch to the senior Scythian officer in Nueva was disclosed to United States intelligence personnel. This message stated: "Execute Plan CHOLERA 022400 June." Plan CHOLERA is known to embrace release to Nuevan control of biological warfare materials together with trawlers and aircraft

equipped to deliver these materials in aerosols. The Plan also includes provision of Scythian biological warfare personnel to act under Nuevan orders.

The National Security Council has grounds for believing Scythia is encouraging Salvaje to make a biological warfare attack upon the eastern coast of the United States. If such an attack is delivered by a small number of vessels at night, it is likely to be approximately one week before medical diagnostic procedures can verify an attack has occurred.

Scythia can then place pressure upon the United States to give up the Base at Coloso by offering to withhold biological warfare materials from Nueva in return for this concession; or can force the United States into an attack upon Nueva at a time when the Organ of Consultation of American States is not convinced that the outbreaks of disease are due to intentional biological attacks.

To forestall the necessity for an attack upon the biological stockpiles and delivery means in Nueva with ultradecisive weapons, the National Security Council will recommend to the President that naval action be taken to interdict the traffic to and from Nueva in biological warfare munitions and equipment and to exclude the movement from and into Nuevan territorial waters and airspace of vessels or aircraft equipped for dispensing contaminated aerosols. This draft proclamation is now being considered.

A PROCLAMATION

Whereas the peace of the world and the security of the United States are threatened by the establishment in Nueva by Scythia of stockpiles of biological warfare munitions and facilities for their clandestine delivery;

Whereas these munitions have been used against Antioka by Nueva in violation of the obligations of Nueva assumed under the Charter of the United Nations, the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance; and by Scythia in violation of its obligations assumed under the Charter of the United Nations; and by both Nueva and Scythia in violation of minimum standards of humanitarian conduct accepted by civilized nations;

Whereas on this date the Government of the United States has placed before the Security Council of the United Nations its complaint that Nueva and Scythia have threatened a breach of the peace and contemplate an armed attack with biological weapons to coerce the United States to terminate its viable treaty with Antioka, providing for United States naval facilities at Coloso, Antioka;

Whereas an attack by unknown biological munitions cannot be met by conventional defensive measures of the type contemplated by Article 51 of the United Nations Charter;

Whereas it is necessary to preserve the *status quo* of biological warfare munitions and means for their delivery in Nueva pending a peaceful resolution of the issue presented in the complaint of the United States by the Security Council or other organs of the United Nations or by other diplomatic processes;

Whereas it is also necessary to procure current information required for peaceful settlement of this dispute pending reception, free access to information and effective functioning of a United Nations Commission of Inquiry or other independent commission of inquiry within the territory of Nueva;

Now, Therefore I -----, President of the United States of America, acting pursuant to authority conferred upon me by the Constitution and statutes of the United States, in accordance with obligations assumed by the United States as a party to the Charter of the United Nations, the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance, and to defend the security of the United States, do hereby proclaim that all forces under my command are ordered, beginning at Greenwich time, June ---- 19--, to establish a zone of surveillance on the high seas and superjacent airspace in the region defined by Article 4 of the Inter-American Treaty of Reciprocal Assistance, and to interdict within this zone such biological warfare munitions and facilities for their delivery as shall be defined by the Secretary of Defense and transmitted by the Secretary of State to all nations maintaining sea or air transport services or both.

The Secretary of Defense shall take appropriate measures to interdict prohibited material and equipment, employing the land, sea and air forces of the United States in cooperation with any forces made available by members of the United Nations.

The Secretary of Defense may make such regulations and issue such directives as he deems necessary to ensure the effectiveness of this order, including the designation of special restricted zones and routes for surface, subsurface or air transit within the zone herein indicated.

Any vessel, surface or subsurface, or aircraft within the zone herein indicated, as further defined by the Secretary of Defense, may be intercepted, required to identify itself and disclose its cargo, equipment, stores and ports of call and may also be required to stop, lie to, surface, land and submit to visit and search. Vessels or aircraft may be diverted for visit and search to such reasonable places

at which an effective health quarantine can be established as may be designated by the Secretary of Defense.

In carrying out this order, force shall not be used except for self-defense and to require compliance with my directions herein or with the regulations or directives of the Secretary of Defense issued hereunder after reasonable efforts have been made to communicate them to the vessel or aircraft. Force shall be used in any case only to the extent necessary.

The United States, Scythia, Antioka and Nueva are members of the United Nations and the World Health Organization. The United States, Nueva and Antioka are also members of the Organization of American States, parties to the Inter-American Treaty of Reciprocal Assistance and to other general treaties and agreements forming the Inter-American System, including the Pan American Sanitary Code of 1924 and the Pan American Health Organization.

You are examining the draft proclamation with a view to suggesting changes to insure its effective execution by naval forces. As part of this examination you are considering the legality of action by naval forces in international law pursuant to the proclamation and regulations and directives of the Secretary likely to be issued thereunder. Do you think the draft proclamation requires revision? If revision is required, what revisions would you suggest and why?

Discussion: Situation 6

1. *Law and Biological Warfare: Tentative Analysis of Facts*

Although the United States, the Soviet Union and other major powers are equipped to wage biological warfare, and states with modest physical resources can marshal a host of germs and germ carriers to be used for military purposes, the legal problems attending future widespread uses of biological weapons are conjectural.

No great attention until the past decade has been given to the law of biological warfare.⁷⁶ This has been due in part to a tendency to confuse biological with chemical weapons.

These devices have different physical characteristics, techniques of employment and incidence of general risk. It has been tacitly assumed that legal problems arising from the use of chemical weapons will arise from the use of biological weapons as well. Effective military biological weapons also are recent innovations.

Past uses of biological weapons have been sporadic, usually by imaginative and resourceful local commanders, who could perceive advantages provided by nature, such as smallpox or plague victims

⁷⁶ See Neinst, "United States Use of Biological Warfare" 24 *Mil. L. Rev.*, 1, 9 (1964) (DA Pam 27-100-24, 1 April 1964).

to be directed into the camp of a susceptible enemy. Opportunities for advance planning to employ biological weapons against an attacker or defender were slight, although these opportunities are now provided by development of militarily effective mutations of biological pathogens. Furthermore, so great were the problems of a commander with disease in his own ranks, that before development of effective immunization techniques and antibiotics, the "blow-back" hazard in biological weapons made their general employment awkward.

It has also been difficult in the past, although it is becoming less difficult in the light of modern warfare conventions, to draw sharp moral or ethical distinctions between situations in which a force awaits debilitation of its enemy by epidemic or endemic diseases before assault; in which the force accentuates the physical problems of its enemy by compounding the work of epidemic or endemic diseases by denying medical personnel, supplies or equipment or by refusing to exchange prisoners or permit civilians in enemy territory to emigrate; and in which the force deliberately infects enemy personnel with debilitating or fatal diseases.

Nineteenth and early 20th century lawmakers and their advisers were unable to make to their satisfaction, in an era prior to the staging of total wars and the mechanical socialization of military risk, moral or ethical distinctions between these transactions. This inability weighed against any intensive consideration of biological warfare in the early arms conferences.

Only two international conventions dealing with techniques of warfare contain provisions related or reasonably applicable to biological warfare. The Geneva Gas Protocol of 1925 prohibits the "use of bacteriological methods of warfare."⁷⁷ Article 23(a) of the Regulations annexed to Hague Convention No. IV forbids the use of poisons or poisoned weapons and perhaps can be construed to extend to biological toxins.⁷⁸

There has been no integration of these provisions for administration and enforcement into the international health regime. The international health regime is based upon a series of sanitary conventions.⁷⁹ The earliest of these was in 1851. The policies expressed in these conventions, keyed to modern medical knowledge and techniques, adjusted to contemporary world political organization, and applied to existing means of transport and communication, now

⁷⁷ 94 L.N.T.S. 65, 69 (1929).

⁷⁸ *Naval War College, International Law Situations*, 1908, 180.

⁷⁹ A summary of the Sanitary Conventions from 1851 through 1951 may be found in Goodman, *International Health Organizations*, 49-79 (1952).

appear in the Charter of the World Health Organization⁸⁰ and the Sanitary Regulations which this Organization issues.⁸¹ Regional health organizations operate under the general aegis of the world body.

There are no international legal restraints upon the *development* of biological munitions except to the extent that testing of the munitions is limited. Tests upon unwilling human subjects may be precluded by international law and limitations may exist upon the preemption or indefinite contamination of certain testing areas.

Restrictions upon biological weapons in conventional warfare are uncertain and there is even greater ambiguity when these weapons are considered for use in various forms of unconventional warfare. Frequent condemnations of alleged biological warfare, when these condemnations are for the purpose of propaganda or to obscure preparations for biological warfare, meet no current legal impediment.⁸²

Threatening an attack with biological weapons and clandestine deployment of these weapons to provide a coercive edge to diplomatic action may be reasonably expected to elicit a violent response from the threatened opponent. An attack with biological weapons may be difficult to detect until much time after the attack has been delivered. This time lag may range from a few hours to several weeks.

There also may be *no passive* defensive measures against some biological munitions. Such munitions might be mutants of biological pathogens little known in the country attacked or threatened.⁸³

⁸⁰ *Yearbook of the United Nations (1946-47)*, 793.

⁸¹ For the current *WHO Regulations No. 2* see 37 *Official Records of the World Health Organization*, 335 (1952). The International Sanitary Regulations are prepared and placed in force by an unusual treaty process. Draft regulations are prepared by an appropriate body of the World Health Organization and laid before the Health Assembly for discussion and adoption. Upon adoption, the Regulations are notified by the Director General to Governments and after the expiration of a time fixed in the notice are binding upon a member state which does not notify its rejection of them. See *Constitution, World Health Organization, Articles 21, 22, Yearbook of the United Nations (1946-47)*, 796.

⁸² Aspects of the exchanges between the United States, the Soviet Union and Red China based upon biological warfare charges by the latter may be found in 26, 27 and 28 *Department of State Bulletin* (1951, 1952, 1953) *passim* and Bechhoefer, *Postwar Negotiations for Arms Control*, 194-201 (1961).

⁸³ "If the agents adaptable to biological warfare were limited to those that cause known diseases, the problems of defense would be less complex. But we know that there is a possibility that an enemy could develop mutant types of diseases for which there would be no known defenses. * * *" Stubbs, *The*

The only defense in this case is an attack upon sources of supply of the munition and upon delivery agencies.

The National Security Council has chosen to rely upon diplomacy to eliminate the threat of biological attack confronting the United States. But the risk of failure of diplomatic processes is unacceptable in this case. The Nuevan-Scythian Concert must be given no opportunity to deliver their biological munitions while negotiations are under way. United States forces must be placed in a position from which the threat can be quickly eliminated if negotiations fail.

The Situation has features in common with the Cuban Quarantine of 1962. Naval operations are to be conducted upon the high seas and in superjacent airspace. Air reconnaissance may be conducted over Nuevan territory. The naval action contemplated is of an economic nature. The flow of certain military supplies is to be interrupted without stimulating major coercive exchanges which might bring into operation the various treaties and customs incident to belligerency.

There are also major distinctions. The danger of immediate attack is probably greater than in the Quarantine of 1962. Biological weapons are maneuvered actively to apply pressure upon the United States. These weapons can be employed at sea for maximum flexibility and can be delivered without likelihood of immediate detection.

The Organization of American States appears unwilling to support the action of the United States. Once action by the United States commences, Scythian disengagement, unlike Soviet disengagement in the Quarantine of 1962, will be difficult because shipments out of Nueva of the prohibited materials and equipment also will be interdicted.

The features in common with the Quarantine of 1962 mean that many of the legal problems present there will be involved also in the situation presently considered. Accordingly, legal aspects of naval participation in the Quarantine will first be examined. Its lessons will then be applied to the threat of biological warfare by Scythia and Nueva.

2. Analysis of the Quarantine in Four Phases

Former Secretary of State Dean Acheson, a distinguished lawyer, public servant and counsellor to the President in the Crisis of October 1962, has remarked that survival of a state is not a matter

of law and the propriety of the Cuban Quarantine is not a legal issue.⁸⁴ Mr. Acheson does not suggest that law was irrelevant to the decision to quarantine but ascribed greater importance in such a decision to judgments by the President and his advisers concerning the timing of action and the generation of power to force a desired response from an opponent.

Few persons consider the Executive Committee advising the President in October 1962, deduced its advice from international law, could have done this if it had tried, or confined its survey of alternatives to courses of action which international law clearly permitted. No rational decision maker is likely to analyze a problem in this way.

The decision maker should forecast the likelihood of volitional acceptance, both of the end sought and the means considered, by persons whose values are affected significantly by the action proposed. There should be a preference for repetitive action, when surprise of the opponent is not critical, to secure *coordination* of the response in situations in which a response amenable to coordination might reasonably be predicted. Adequate machinery and standards for *guiding* subordinates in executing the decision should be provided.

But despite the accuracy of Mr. Acheson's observation when related to the high level of decision he was considering, as problems were defined or particularized on lower levels of decision as the Quarantine was planned and executed, law—in its conventional sense—became increasingly relevant. As concrete cases were presented, law was needed to *coordinate* action, *persuade* opponents and allies and *guide* subordinates.

Many decisions were involved in the Quarantine, each in a slightly different context, and each of which could raise distinct legal issues.

Rational judgments applying law to the Quarantine require consideration of the basic decision by the President with the many other decisions by the President and other officials and private persons involved in the conflict. These include the President's decision to coordinate action by the United States with the mediating efforts of the Secretary General, the President's decision to terminate the Quarantine, the decisions of his executive officers and the decisions of officers of international organizations and other states drawn into the conflict.

The dimensions of conflict in the Quarantine changed as new demands by new participants were asserted. The shape of inter-

⁸⁴ (1963) *Proc. Am. Soc. Int. Law*, 13, 14.

action among the participants varied from a high degree of intensity of coercion in the beginning to a high intensity of persuasion in the end. As new advisors to new decision makers joined the contest, differing concepts of the function of law and the requirements of a legal order were injected into the policy exchanges.

To develop a perspective of the mesh of decisions involved in the Quarantine, it is convenient to consider the Quarantine as having developed in four phases. The phase lines selected are laid at points at which key or critical policies were *exposed* by their maker. "Exposure" of a policy means that the policy maker has temporarily crystallized his position *vis-à-vis* his own subordinates or superiors or with respect to the target of his policy.

The policy maker exposes his policy when he reaches either a point of "no return" or a point at which a return to the *status quo ante* would be so awkward that serious consideration of this return is precluded. Execution of the policy need not necessarily have commenced for these situations to arise.

a. CUBAN QUARANTINE: PHASE 1

The first phase of the Quarantine began with the President's receipt of information concerning the presence of offensive weapons with crews in Cuba. The phase ended with delivery of the President's proposed public address on the crisis to Ambassador Dobrynin at about 6:00 P.M., E.S.T., 22 October 1962. This phase covers the secret planning of the Quarantine.

The most detailed accounts of the conferences of the President's "Executive Committee" have been offered by Mr Sorensen, Special Counsel to the President and by Mr. Abel.⁸⁵ However, it is probable that the details of the conferences have been incompletely disclosed and are likely to remain so until security restrictions are lifted and the recollections of additional participants and their staffs can be probed. Any current analysis of the role of law in this decision-making process must necessarily be provisional.

All commentators dealing with this first phase of the Quarantine recognize the planning as unilateral by the United States. Allies of the United States were informed of the decision before the

⁸⁵ Sorensen, *Kennedy*, 674-718 (1965); Abel, *The Missile Crisis* (1966). For similar detail see Schlesinger, *A Thousand Days*, 801-819 (1965). All accounts suggest legal considerations were involved in formulating the "quarantine" policy but figured in a subordinate role. Accounts, which are less detailed and no doubt less accurate since the writers lacked first-hand knowledge of the proceedings, may be found in the controversial article by Alsop and Bartlett, "In Time of Crisis," *Saturday Evening Post*, 8 December 1962, 15 and in Daniel and Hubbell, *Strike in the West* (1963).

announcement to the American public. They were not, however, consulted in its formulation.

It is unlikely the legal foundations of any demands these allies might make were considered in any detail by the Executive Committee advising the President. Treaty obligations of the United States and international legal doctrine bearing upon "intervention" do appear to have been considered.

The presence of Ambassador Stevenson as a member of the Executive Committee and reports of his extensive participation suggest careful attention to the alternatives open to the United States as a member of the United Nations. Treaties of the Inter-American system appear to have been discussed and weighed. Rapid action by the United States in bringing its case before the United Nations and the Organization of American States suggests responsibilities of membership in these organizations were carefully assessed.

The selection of naval force as the major policy instrument indicates consideration and appreciation of the legal features of the impending conflict. Naval units—surface, subsurface and air—can apply a broad range of coercive and persuasive policies. Naval force is the flexible armed instrument for national action.

The Quarantine may have been among the least coercive of the alternatives open to the United States in the October crisis. But naval forces, in executing the Quarantine, could also apply maximum coercion to destroy the missiles and their sites if this proved necessary.

Furthermore, the operations of surface craft in situations such as those developed in the Quarantine have long been familiar. The "pacific blockades" discussed by publicists in the late 19th and early 20th centuries may not have hurdled a generation of controversy to become settled international legal custom. But as minimum exercises of coercion in situations in which maximum exercises of coercion might reasonably have been expected, pacific blockades have had virtues as convenient short circuits for applications of coercive power.

Moreover, by adopting a pattern of naval action similar to pacific blockade, United States policy makers were working at the threshold of law—where the coordinating features of law were present although the persuasive features of unresisted repeated practice were lacking. The examples of pacific blockade were few and records of voluntary agreement to their use even fewer.

Pacific blockade records, few as they were, provided a basis for Soviet predictions concerning the probable direction of development of American action. The Soviets could read between the lines of

the various executive statements concerning Quarantine operations. A standard was provided for estimating the degree of violence which United States naval forces were likely to apply.

In war a policy hewing to this predictable pattern might spell disaster for the United States. In the Quarantine, communications were improved and the chances of accomplishing the objects of United States policies were enhanced.

The coordinating element of law was present in adoption by the United States of a "pacific contraband" pattern for action—a minor variant of the "pacific blockade." The United States did not rely on "pacific blockade" doctrine to *persuade* its allies or opponents. Nor would the Soviets have admitted the "legality" of naval interference with their shipping.

Pacific Blockade

Pacific blockade is founded upon the sharp war-peace dichotomy characterizing 19th century legal thought. A few instances of pacific blockade, such as the French blockades of Formosa in 1884–1885⁸⁶ and of Siam in 1893,⁸⁷ are described as "pacific" principally because the blockaded state could offer no resistance. In other cases, such as the Chilean blockade of Bolivia in 1879,⁸⁸ the conflict was a war in the nineteenth century legal sense, but was too limited to stimulate declarations of neutrality by nonparticipants. Still other cases involve uses of naval power to collect debts from recalcitrant debtors. The pacific blockades of Portugal (1831);⁸⁹ Carthage (1834);⁹⁰ Mexico (1838);⁹¹ and San Salvador (1842)⁹² by France; New Granada (1837);⁹³ Nicaragua (1842 and 1844);⁹⁴ Greece (1850);⁹⁵ and Brazil (1862–1863)⁹⁶ by Great Britain; and the joint blockade of Venezuela by British, German and Italian units in 1902–1903;⁹⁷ fall within this category. Today these actions clearly would be inconsistent with treaty obligations of the blockaders.

Several pacific blockade cases involved peace maintenance efforts in joint operation by naval powers. These cases occurred before the

⁸⁶ See Hogan, *Pacific Blockade*, 122 (1908).

⁸⁷ *Ibid.*, 137.

⁸⁸ *Ibid.*, 120.

⁸⁹ *Ibid.*, 77.

⁹⁰ *Ibid.*, 82.

⁹¹ *Ibid.*, 85.

⁹² *Ibid.*, 91.

⁹³ *Ibid.*, 83.

⁹⁴ *Ibid.*, 92, 95.

⁹⁵ *Ibid.*, 105.

⁹⁶ *Ibid.*, 117.

⁹⁷ *Ibid.*, 149.

development of multinational security organizations, such as the League of Nations and the United Nations.

Thus Great Britain, Russia and France agreed in 1827 to act together to restore peace in Greece. The powers established a blockade of the Morea to prevent egress of the Turkish fleet from Navarino; and, without a rupture of diplomatic relations with the Porte, ultimately destroyed the Turkish fleet in a major naval action.⁹⁸

Anglo-French naval forces blockaded the Netherlands in 1832–1833 to require the latter to execute the treaty of 1831 for the independence of Belgium.⁹⁹ French naval units blockaded Uruguay to cut off supplies from Argentina to the Oribe forces;¹⁰⁰ and this blockade was revived in 1845–1850 by Anglo-French vessels.¹⁰¹

The blockades directed by Great Britain, Austria, Germany, Italy and Russia against Greece in 1886;¹⁰² and by the same powers with the addition of France against the Greeks in Crete in 1897;¹⁰³ have been regarded by most commentators as actions taken with a principal motive to reduce disorder and facilitate negotiations to restore peace.

When peace enforcement or restoration of peace has been the principal object of naval action, the form of interference with shipping has been analogous to a wartime imposition of contraband controls rather than to a “close” blockade as understood prior to World War I. In the Greek blockade of 1827, the blockading force appears to have denied only weapons and reinforcements to the Turkish army.¹⁰⁴ The blockade of Crete in 1897, while applying to all Greek vessels, was applied only to supplies destined for Greek insurgents when carried on vessels of other states.¹⁰⁵ The French blockade of Uruguay in 1838–1840 seemed intended to deny arms and troops to Oribe, although the joint Anglo-French blockade of 1845–1850 seems to have extended to all dutiable merchandise.¹⁰⁶

There has been no express formulation by writers on the subject or in the judgments of courts of a theory of “pacific contraband”

⁹⁸ *Ibid.*, 73.

⁹⁹ *Ibid.*, 80.

¹⁰⁰ *Ibid.*, 88.

¹⁰¹ *Ibid.*, 98.

¹⁰² *Ibid.*, 126.

¹⁰³ *Ibid.*, 142.

¹⁰⁴ *Ibid.*, 74, 75.

¹⁰⁵ *Ibid.*, 144, 49.

¹⁰⁶ *Ibid.*, 89. Note, however, the official notice to the British Foreign Office seemed to extend to “any merchandise subject to custom house duties” as was in fact the ambit of the later Anglo-French blockade of 1840–1850. *Ibid.*, 161.

as distinguished from "pacific blockade." In *Le Comte de Thomar*,¹⁰⁷ decided by the French Prize Court, a Brazilian merchantman which had received no notice of the French blockade of Uruguay was seized while carrying powder and lead to the Oribe forces. Under the French prize practice, the vessel could not be condemned for breach of blockade because it had no notice.

It was then sought to condemn its cargo as contraband. This the court held could not be done because there could be contraband only in time of war and only a belligerent could seize it.

Yet, despite *Le Comte de Thomar*, the pacific contraband aspect of pacific blockade, described by some writers as a "selective blockade"; and a nonwartime practice related to unneutral service, which might be described as "unlawful destination, detention or service"; when divorced from the rubric of pacific blockade and the obsolete practice by which debts are collected through the use of naval power, may suggest the nature of future nonbelligerent applications of naval force involving minimum violence.

The British and German pacific blockade of Zanzibar in 1888-1889, to interrupt the trade in arms is a typical early example of application of pacific contraband rules; or to the extent directed to interruption of the traffic in slaves, as application of doctrine concerning "unlawful destination, detention, or service."¹⁰⁸

Nationalist Chinese naval operations, conducted upon a theory of closure of the mainland ports, might be better received by the major maritime nations if conducted under clear-cut "pacific" contraband lists.¹⁰⁹

During the period of illegal entries into Palestine, preceding termination of the British Mandate, British operations against ships on the high seas carrying illegal immigrants might be supported by an analogy to unneutral service in time of war.¹¹⁰ A state normally is expected to apply its immigrant controls within its territorial waters. But this narrow ambit for action presupposes stable political conditions within the state which seeks to control immigration and controls applied at points of sea or air embarkation.

¹⁰⁷ Pistoye & Duverdy, 1 *Traite des Prises Maritimes*, 390 (1855). See Hogan, *Pacific Blockade*, 104 (1908).

¹⁰⁸ Hogan, *Pacific Blockade*, 130 (1908).

¹⁰⁹ For a discussion of the theory of port closure see Woolsey, "Closure of Ports of the Chinese Nationalist Government," 44 *A.J.I.L.*, 350 (1950).

¹¹⁰ For a discussion of British activity see *Naim Molvan v. Attorney General* (1948) A.C. 351 (P.C. 1948). Over forty vessels were visited and searched. Most of these ultimately were seized, although in most instances the seizures took place within Palestinian territorial waters.

British visit and search of vessels upon the high seas suspected of carrying illegal immigrants; escort of vessels found to be carrying illegal immigrants within Palestinian territorial waters; and seizure of the vessels there with an orderly disembarkation and temporary detention of their passengers seemed acceptable to most of the maritime nations.

Practices of "pacific contraband" and "unlawful detention, destination or service," for which no general acceptance by states can presently be claimed, merge into the relatively well settled practices by which a state enforces its revenue and quarantine laws against vessels "hovering" off its coast or its trade restrictions imposed upon persons within its territorial waters. A hovering theory will support French naval action to intercept arms shipments to Algeria. "Self-defense," as in the "Quarantine," also is a strong argument.

Dutch naval operations in the Indonesian area prior to Indonesian independence appear to have been almost, if not entirely, within Indonesian territorial waters and aimed at smuggling, the arms trade, and shipments of nationalized property.¹¹¹ The Egyptian naval action against shipping to Israel commenced as a blockade *jure belli* confined, however, largely to interdiction in the Suez Canal and its approaches.¹¹²

While there is not general acquiescence in any of these practices by the states affected, upon which a positivistic claim of law developed by consent can be founded, it has become almost routine to tolerate naval interferences with shipping in areas in which tensions are great, as in the Formosa Straits or Caribbean, with little more than token protests. Policy makers of states have been conditioned to accept naval interference with shipping without a routine violent response although protests may be filed. The response is much the same as that of the usual private citizen to police officers serving his community.

This general attitude seems based upon four factors: (1) The close control maintained by a state over its naval forces and the high degree of discipline of officers and men which the efficient conduct of naval affairs requires; (2) The usual familiarity of naval officers with international law pertaining to their duties; (3) The lack of an adequate system of international police upon the high seas;

¹¹¹ See *S.S. Martin Behrman*, 16 *Department of State Bulletin*, 720 (1947).

¹¹² A summary of decisions of the Egyptian Prize Court may be found in 44 *A.J.I.L.*, 774 (1950). Continuation of the Egyptian action since the Armistice, which has been described by several writers as a form of pacific blockade, is considered in detail in Gross, "Passage Through the Suez Canal of Israel Bound Cargo and Israel Ships," 51 *A.J.I.L.*, 530 (1957).

(4) The range of persuasion and coercion of which a naval force is capable.

The choice of the naval service as the major executive agency in the Quarantine suggests the Executive Committee weighed the flexibility in law and power of this service in its recommendation to the President. While the Navy was a logical and efficient choice to interdict sea carriage of ballistic missiles, their supporting equipment and unassembled aircraft, interdiction by sea action was by no means the quickest method to exclude the offensive arms from Cuban soil.

A violent response to seizures of Cuban ports of destination or launching sites for the missiles by airborne units or to destruction of these by ultradecisive weapons might reasonably be predicted. Policy makers are conditioned to accept without violent responsive action the accustomed and easily controlled types of intervention.

The "justification" for prompt action by the United States to interfere with installation of the Soviet missiles and their supporting equipment and the importation into Cuba and assembly there of jet bombers was considerable. As summarized in the President's public address of 22 October 1962¹¹³ and as derived from other public sources, these facts were before the Executive Committee:

(1) Medium range ballistic missiles with an effective nuclear armed range of 1,000 nautical miles were installed in Cuba and operational. Sites for intermediate range ballistic missiles were under construction.

(2) Jet bombers capable of transporting and delivering nuclear weapons were in Cuba and being assembled. Bases for them were in preparation.

(3) Soviet crews to man these weapons systems were in Cuba.

(4) Additional missiles, fuel, supporting equipment, planes and crews were in transit by sea to Cuba.

(5) In the usual military sense, undistorted for deception or propaganda, the missiles and aircraft in Cuba sent by the Soviet Union were designed principally as "initiative" or "offensive" weapons. The President had made clear to Soviet representatives that weapons of this type were regarded as "offensive weapons" by the United States.

(6) Missiles fired from Cuba against targets in the United States would bypass the long-range warning system. The reaction time which this long-range warning system could provide would be eliminated. This reduced the deterrent effect of United States missiles and aircraft. Furthermore, bringing all parts of the United States

¹¹³ *N.Y. Times*, Oct. 23, 1962, p. 18, col. 2.

within range of Soviet medium-range and intermediate-range missiles eliminated the advantage of the United States in effective intercontinental (long-range) ballistic missiles. The power equilibrium between the free and closed worlds was significantly upset.

(7) Shipment and installation of the Soviet weapons systems were rapid and clandestine. Public and private assurances of representatives of the Soviet Union were violated. These features suggested Soviet intentions of (1) surprise attack or (2) surprise diplomatic action. Although failure to camouflage the bases with care suggests surprise diplomatic action as the immediate Soviet intention, surprise attack could not be excluded in view of the tension between the United States and the Soviet Union.

While the existence of "justification" for action does not mean that the action was necessarily "legal" or necessarily "illegal," features other than subjective judgments by an actor being relevant in community judgments within a legal order, the continuing effort to find facts before the decision to Quarantine was made and as the Quarantine was executed, coupled with the element of "necessity" for action which these facts disclosed, do bear upon community judgments of legality.

During the deliberations of the Executive Committee and thereafter during conduct of the Quarantine, except for a short time during the visit of Acting Secretary General U Thant to Cuba, intensive efforts to assemble facts were made by air reconnaissance and other means. Although no decision maker constitutionally responsible for the security of his state against foreign armed attack is expected to exhaust the fact-finding resources at his disposal—in the sense that a court or legislative committee might be expected to delay decisions pending availability of important witnesses or documents—diligence in seeking facts before his decision and during execution of his policy is an element of the legal standard of "reasonableness" by which his action may be measured.

Naval force was used to stabilize Soviet power in Cuba at its pre-Quarantine level pending a clarification of Soviet objectives. The impact of naval action in producing a disclosure of Soviet intentions, an important part of the fact-finding process, was as important as the impact of naval action in preserving the status quo. Stability and information were joined to permit the working of persuasive processes.

The intense effort to acquire facts upon which a sound decision might be based; the apparent care and reflection by the Executive Committee in formulating the advice considered by the President; the President's decision to use minimum coercion; his selection of

naval force as the coercive instrument; the limitations placed upon employment of the naval force—both in the Proclamation and in directives of the Secretary of Defense; and the immediate recourse both to the Organization of American States and the United Nations; all suggest the decisive role played by domestic and international law in channeling the President's decision. A more effective working of law in the development of human affairs is difficult to conceive—and the case for legality of the first phase of the Quarantine was established before any Quarantining vessel was on station.¹¹⁴

b. *CUBAN QUARANTINE: PHASE 2*

The second phase of the Quarantine extends from delivery of the Dobrynin letter on 22 October until publication of the Soviet order to its vessels transporting prohibited weapons, equipment or supplies to avoid the area of American naval interdiction. This order was issued at an undisclosed time on the morning of 24 October. The President's Quarantine Proclamation had become effective at 10:00 A.M., E.S.T., on that date.

The period of unconcerted confrontation of the Soviet Union by the United States was limited to this second phase. The only contact, however, between the Soviet units and the quarantining force was audiovisual. This contact included sonar tracking of submarines and air reconnaissance of Soviet shipping by Navy and Air Force units.

Overwhelming force was coupled with concomitant recourse by the United States to processes for negotiation. The case of the United States was placed promptly before the Security Council of the United Nations.¹¹⁵ The United States obtained the support

¹¹⁴ An impressive array of legal skills were available to the President in his Executive Committee—the Attorney General, Ambassador Stevenson, Mr. Acheson and Mr. Ball performing advisory functions.

Professor Mallison lists the Judge Advocate General of the Navy, the Deputy Judge Advocate General, the Assistant Navy Judge Advocate General for Administrative and International Law and the Director of the Navy International Law Division as having worked on the President's Proclamation.

Civilian consultants included the Deputy Attorney General, the Legal Adviser of the Department of State, the General Counsel of the Department of Defense, and Mr. Yarmolinsky, Special Assistant to the Secretary of Defense. See Mallison, "Limited Naval Blockade or Quarantine Interdiction: National and Collective Defense Claims Valid Under International Law," 31 *Geo. Wash. L. Rev.*, 335, 336 n. 196 (1962).

A detailed identification of Executive Committee members appears in Sorensen, *Kennedy*, 674–675 (1965).

¹¹⁵ For the text of Ambassador Stevenson's letter to President Zorin of the

of the Organization of American States, formalized in the Resolution of the Provisional Organ of Consultation.¹¹⁶ Correspondence was exchanged between the President and Chairman Khrushchev.¹¹⁷ As the phase ended, the conciliatory tone of the Khrushchev letter to Lord Russell signalled Soviet recognition of a margin of United States naval supremacy in the Caribbean which precluded rational challenge.¹¹⁸

Security Council and the text of the appended draft resolution, see 47 *Department of State Bulletin*, 724 (1962).

The draft resolution called for immediate dismantling and withdrawal from Cuba of all missiles and other offensive weapons, for the dispatch to Cuba of a United Nations observer corps to see that this was done, and for termination of the Quarantine upon United Nations certification of compliance with the order to dismantle and withdraw the missiles and other offensive weapons.

Paragraph 4 of the draft resolution urged the United States and the Soviet Union to confer promptly on measures to remove the existing threat to the security of the Western Hemisphere and report thereon to the Security Council. The text of Ambassador Stevenson's statement to the Security Council on October 23, 1962, appears at 47 *Department of State Bulletin*, 723 (1962).

¹¹⁶ See 47 *Department of State Bulletin*, 722 (1962). After a preamble, the Council resolves: (1) To call for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability; (2) To recommend that the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed forces which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent; (3) To inform the Security Council of the United Nations of this Resolution in accordance with Article 54 of the Charter of the United Nations and to express the hope that the Security Council will, in accordance with the draft Resolution introduced by the United States, dispatch United Nations observers to Cuba at the earliest moment; (4) To continue to serve provisionally as Organ of Consultation and to request the member states to keep the Organ of Consultation duly informed of measures taken by them in accordance with paragraph two of this Resolution.

The Resolution was approved unanimously by the Council. As the Resolution suggests, the case of the United States was before the Security Council before the Resolution was passed. The President's Proclamation of Quarantine was delayed until the Council of the Organization of American States had acted. The Proclamation of Quarantine appears at 27 *Federal Register* 10401 (No. 3504) and also at 47 *Department of State Bulletin*, 717 (1962).

¹¹⁷ See *N.Y. Times*, Oct. 25, 1962, p. 22, col. 2. The text of this letter has never been published. The secret letter paraphrased in Abel, *The Missile Crisis*, 178-181 (1966) appears to be of a later date. Delivered to the President apparently on October 24, it was said "to be in the same inconclusive vein as the Kremlin's public statements thus far."

¹¹⁸ See *N.Y. Times*, Oct. 25, 1962, p. 22, col. 2. The letter was published five

Although the problem remained to secure the removal of missiles and other offensive weapons from Cuba, an increase of the threat to the United States by the introduction of additional missiles or aircraft was blocked by the mere display of naval force. Once determination to use this force was demonstrated, the United States and the Soviet Union resolved on a settlement of the issues by negotiation rather than by violence.

c. *CUBAN QUARANTINE: PHASE 3*

During the third phase of the Quarantine, extending from publication of the diversion order by the Soviet Union to its transports to publication of the Khrushchev letter of 28 October,¹¹⁹ announcing his order for dismantling and return to the Soviet Union of missiles, offensive aircraft and their supporting equipment in Cuba, Acting Secretary General U Thant became active in attempting to resolve the conflict. Seeking a voluntary suspension of both arms shipments from the Soviet Union and the Quarantine by the United States, the Acting Secretary General secured an informal understanding on 26 October, stated in the words of the President:¹²⁰

* * * /I/f the Soviet Union accepts and abides by your request 'that the Soviet ships already on their way to Cuba stay away from the interception area' for the limited time required for preliminary discussion, you may be assured that this Government will accept and abide by your request that our vessels in the Caribbean 'do everything possible to avoid direct confrontation with Soviet ships in the next few days in order to minimize the risk of an untoward incident' * * *

Chairman Khrushchev, having diverted Soviet vessels because he was powerless to prevent their seizure and could not hazard capture of their secret tackle and cargo, replied to the Acting Secretary General:¹²¹

* * * /W/e therefore accept your proposal, and have ordered the masters of Soviet vessels bound for Cuba but not yet within the area of the American warships' piratical activities to stay out of the interception area as you recommend.

Any substantial chance of a violent encounter between United

hours after the Quarantine went into effect. While Daniel and Hubbell state that the State Department decided to ignore this maneuver because Lord Russell was "so discredited a figure," the letter suggested summit talks and was the first public suggestion that the Soviet Union would not attempt to break the Quarantine. See Daniel and Hubbell, *Strike in the West*, 139 (1963).

¹¹⁹ See 47 *Department of State Bulletin*, 743 (1962).

¹²⁰ *N.Y. Times*, Oct. 27, 1962, p. 8, col. 4.

¹²¹ *N.Y. Times*, Oct. 27, 1962, p. 8, col. 2.

States naval forces and Soviet surface craft was thus eliminated. A watch was maintained by United States naval units, a few Soviet trawlers were shadowed and Soviet and unidentified submarines were harassed.¹²²

Prior to this informal agreement secured by the Acting Secretary General, United States naval personnel from two ships boarded and searched *Marucla*, a Soviet chartered Lebanese merchantman, about 180 miles northwest of Nassau. The master cooperated in the visit and search. No prohibited items were found.¹²³ Two Soviet tankers, *Vinnitiza* and *Bucharest*, and an East German passenger ship, *Voelkerfreund*, traversed the interception area without being boarded. The master of *Bucharest* and the captain of the intercepting destroyer exchanged messages.¹²⁴ *Vinnitiza* and *Voelkerfreund* appear to have been hailed, but no further details of the encounters are reported.¹²⁵

The disturbance of sea commerce of states other than the Soviet Union during the third phase of the Quarantine was at a minimum. Special warnings that reactions to the Quarantine might render hazardous transit of the Yucatan Channel, Florida Straits and Windward Passage, were broadcast at regular intervals by the Navy. A "Clearcert" system, similar to the British Navicert system of World War II, was announced on 27 October.¹²⁶ Many of the certificates were issued.

A clearance certificate could be obtained from United States customs authorities for a vessel departing without contraband from a United States port—whether bound for Cuba or merely transiting the interception zone. For vessels departing from foreign ports, a Notice of Transit could be filed with the American consulate at the last port of departure if the vessel was only to cross the interception

¹²² See Daniel and Hubbell, *Strike in the West*, 163 (1963).

¹²³ *Ibid.*, 166–67 for a detailed account; Sorensen, *Kennedy*, 710 (1965).

¹²⁴ *N.Y. Times*, Oct. 26, 1962, p. 1, col. 2. The encounter occurred 22 hours after the effective time of the Proclamation. The master appeared uncooperative, but from an inspection without boarding, naval personnel decided only petroleum products were aboard.

¹²⁵ *Vinnitiza* was the first Soviet vessel to pass the Quarantine and reach Cuba. See *N.Y. Times*, Oct. 27, 1962, p. 6, col. 4. She may have cleared the interception area before the Quarantine was fully established. *Bucharest* and *Voelkerfreund* were allowed to pass without boarding by Presidential order that sufficient time be allowed for each ship to obtain Soviet instructions. See Abel, *The Missile Crisis*, 158–159 (1966); Sorensen, *Kennedy*, 710 (1965).

¹²⁶ See *N.Y. Times*, Oct. 25, 1962, p. 20, col. 6. These notices are reproduced in Christol and Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962," 57 *A.J.I.L.*, 525, 544 (1963).

zone. If bound for a Cuban port with no contraband, a clearance certificate could be obtained from the American consulate.¹²⁷

There was minor interference with shipping. The depressing effect of the Quarantine upon trade in the Caribbean was noted in the Greek merchant marine.¹²⁸ The Holland-American and Swedish-American Lines rerouted their vessels to avoid the Windward Passage.¹²⁹ British marine underwriters invoked the fourteen day war risk clause in insurance contracts upon vessels engaging in the Cuban trade and rates for the excluded area had to be established by special agreement.¹³⁰ Air traffic into Cuba and across the interception zone was reduced by Cuban security restrictions on air transit and denial of landing privileges by many states to the Soviet Union.¹³¹ Although the Quarantine Proclamation applied to aircraft, no effort appears to have been made by the United States to use Quarantining units to intercept or divert them.

The coercive exchanges of the second phase of the Quarantine, as a result of which no physical damage was inflicted, were reshaped by negotiation during the third phase into mutual postures in which persuasive rather than coercive techniques were paramount. This position was attained by reliance both by the United States and the Soviet Union upon processes of mediation and negotiation which the United States could provide, coupled with reasonable cooperation by the President in a period of stress and anxiety with the peacemaking efforts of the Acting Secretary General.

d. *THE CUBAN QUARANTINE: PHASE 4*

During the fourth phase of the Quarantine, which might be described as a "peeping tom blockade," naval action by the United States was concerted with action by the Soviets. Apart from the continued harassment of submarines,¹³² there were no coercive features.

¹²⁷ See 47 *Department of State Bulletin*, 747 (1962). The vessel could be boarded and searched even if it possessed the clearance certificate or had filed the notice of transit. This interference was unlikely and an expeditious clearance was possible.

¹²⁸ See *N.Y. Times*, Oct. 26, 1962, p. 18, col. 3. Two hundred Greek vessels were said to be laid up with about 100 more affected in their use by restrictions on the Cuban trade.

¹²⁹ *N.Y. Times*, Oct. 25, 1962, p. 21, col. 2.

¹³⁰ *N.Y. Times*, Oct. 25, 1962, p. 21, col. 4. United States insurers had ceased coverage with the embargo upon American shipments to Cuba.

¹³¹ *N.Y. Times*, Oct. 24, 1962, p. 22, col. 4; Oct. 27, 1962, p. 7, col. 6.

¹³² Submarines were warned to surface by underwater explosion of four or five harmless charges accompanied by the international code signal "I.D.K.C.A.,"

Eight Soviet vessels outward bound from Cuba were visually inspected without boarding. The visual inspections were conducted from ships alongside the Soviet transports and from helicopters. Masters of the Soviet vessels were cooperative in almost every instance. Some of them ordered removal of the covers of crates on deck. The vessels transported a total of forty-two crates which appeared to contain missiles and deck cargo which appeared to be missile launching equipment.

The Quarantine was suspended for two days (30 and 31 October) while the Acting Secretary General was in Cuba. The Quarantine was terminated on 21 November 1962 after the President was assured by Chairman Khrushchev that Soviet jet bombers would be withdrawn within thirty days.¹³³

3. Selected Legal Analyses of the Quarantine: Applications to the Threat of Biological Attack

Writing shortly after termination of the Quarantine, Professor Mallison of the George Washington Law School developed effective self-defense and collective self-defense arguments supporting the United States action.¹³⁴ Basing his analysis upon the framework developed by Professor McDougal and Dr. Feliciano,¹³⁵ Professor Mallison examines the objectives of the claimants; the proportion of the response by the United States to the initiating coercion of the Soviet Union; and the reasonableness of the expectation of necessity in the responding action.

He finds the Quarantine a form of coercion permitted under Articles 51 and 2(4) of the United Nations Charter. The weight of a collective judgment of necessity when action is pursuant to the authority of the Organization of American States is stressed.

meaning "rise to the surface." Submarines were then to surface on an easterly course.

Contact by United States naval forces with Soviet and unidentified submarines was said by Admiral George W. Anderson, U.S.N., Chief of Naval Operations during the Quarantine, to have provided "perhaps the best opportunity since World War II" to perfect the skills of United States antisubmarine warfare forces. See Christol and Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962." 57 *A.J.I.L.*, 525, note 26 at 530 (1963).

¹³³ *N.Y. Times*, Nov. 21, 1962, p. 10, col. 1; Pres. Proc. No. 3507, 27 *Federal Register* 11525 (1962).

¹³⁴ Mallison, "Limited Naval Blockade or Quarantine Interdiction: National and Collective Defense Claims Valid Under International Law," 31 *Geo. Wash. L. Rev.*, 335 (1962).

¹³⁵ McDougal and Feliciano, *Law and Minimum World Public Order* (1961).

Summarizing his conclusions concerning legality of the Quarantine, Professor Mallison writes: ¹³⁶

* * * /T/he limited coercion involved in the quarantine-interdiction was used in response to the initiating coercion of the Soviet Union. This initiating coercion has been appraised factually as posing a threat to the very survival of the United States.

* * * It has been appraised legally as inconsistent with the legal obligations assumed by member states of the United Nations. In this context, the formulation and implementation of the naval quarantine-interdiction amount to the least possible use of the military instrument. Any lesser use would have amounted to abandonment of the military instrument and exclusive reliance upon noncoercive procedures which would almost certainly have been ineffective without supporting military power. The quarantine-interdiction * * * meets the requirements of reasonable necessity in its most stringent form. In the same way, the proportionality requirement in its most extreme form is met easily. The conclusion of validity under international law follows. If it did not, the consequence would be that the inherent right of national and collective self-defense, and its recognition as /a/ primary right in the United Nations Charter, would be destroyed.

The Mallison self-defense and collective self-defense position received support by Professors Fenwick,¹³⁷ MacChesney¹³⁸ and McDougal¹³⁹ in editorial comments written about six months after termination of the Quarantine. The Mallison position tends to be supported by other commentators even though the latter may offer some other ground for validity of the United States action.

The official position of the Department of State concerning legality of the Quarantine, offered to the press and set forth in detail in articles by Legal Adviser Chayes¹⁴⁰ and Deputy Legal Adviser Meeker,¹⁴¹ pivots upon the Resolution of 23 October 1962 by the Council of the Organization of American States. Acting provisionally as an Organ of Consultation, the Council recommended individual

¹³⁶ Mallison, *supra*, note 134 at 392.

¹³⁷ Fenwick, "The Quarantine Against Cuba: Legal or Illegal," 57 *A.J.I.L.*, 588 (1963).

¹³⁸ MacChesney, "Some Comments on the 'Quarantine' of Cuba," 57 *A.J.I.L.*, 592 (1963).

¹³⁹ McDougal, "The Soviet-Cuban Quarantine and Self-Defense," 57 *A.J.I.L.*, 597 (1963).

¹⁴⁰ See Chayes, "The Legal Case for U.S. Action on Cuba," 47 *Department of State Bulletin*, 763 (1962); "Law and the Quarantine of Cuba," 41 *Foreign Affairs*, 550 (1963); and "Remarks," (1963) *Proc. Am. Soc. Int. Law*, 10.

¹⁴¹ Meeker, "Defensive Quarantine and the Law," 57 *A.J.I.L.*, 515 (1963).

and collective action by member states, including armed force, which these states deemed necessary to:

* * * ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent.¹⁴²

The State Department law officers argue under Article 52(1) of the United Nations Charter,¹⁴³ the Organization of American States, while still subordinate to the World Organization, may use force in cases other than those involving armed attacks when this use is to maintain peace and security in the Hemisphere. This action may be taken without prior authorization by the Security Council.

The action is stated to be consistent with Article 2(4) of the United Nations Charter¹⁴⁴ as a measure adopted by a regional organization in conformity to the provisions of Chapter VIII. The purposes of the Organization of American States and its activities are consistent with the purposes and principles of the United Nations as required by Article 52(1).

Prior authorization by the Security Council is said by the State Department officials to be unnecessary under Article 53(1) because the Organ of Consultation recommended rather than ordered a use of force. Language of the Charter, an advisory opinion of the World Court,¹⁴⁵ and records of the practice of the Security Council are

¹⁴² See 47 *Department of State Bulletin*, 723 (1962).

¹⁴³ Article 52(1) provides: "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

¹⁴⁴ Article 2(4) provides: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

¹⁴⁵ *Advisory Opinion of the International Court of Justice: Certain Expenses of the United Nations /1962/* I.C.J. Rep. 151. The most detailed statement of the "prior authorization" point appears in Meeker, "Defensive Quarantine and the Law," 57 *A.J.I.L.*, 515 (1963), p. 520.

Article 53(1) provides: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. * * *" (Measures against an "enemy" state as defined in paragraph 2 of the Article are excepted.)

offered to support the proposition that enforcement action is a response to an order to act.

The spokesmen also argue *prior* authorization is not required by Article 53(1) and *subsequent* authorization is sufficient if an authorization of any sort is necessary. A subsequent authorization, they contend, was given impliedly by the Security Council when it considered and did not forbid the proposed Quarantine before action was taken by the Organization of American States.

Deputy Legal Adviser Meeker urges, as part of his case for the United States, that extrahemispheric countries "such as the U.S.S.R. are not in a position to attack the organization's activities within the region" because the purposes and activities of the Organization are in conformity with the relevant provisions of the United Nations Charter.¹⁴⁶ He may suggest in this context that the Organization of American States enjoys exclusive competence, subject of course to intervention by the Security Council or recommendations by the General Assembly, to recommend and guide applications of force by its members within the geographical area defined by Article 4 of the Inter-American Treaty of Reciprocal Assistance (the Rio Pact).¹⁴⁷

With respect to Cuba, the State Department case is strong. Cuba, however, was involved in the Quarantine principally as a potential, although receptive, launching pad for Soviet missiles: and the State Department arguments do not develop with clarity a theory to support applications of force against Soviet vessels upon the high seas.

Deputy Legal Adviser Meeker points to the anomaly which would exist if the United States could destroy the missiles in Cuba by an air strike or invasion but could not use less violent means upon the high seas to interfere with the introduction of missiles into Cuba. This anomaly would exist if the United States did have authority for an air strike or invasion based upon the Council Resolution of 23 October.

It is by no means certain, however, that an application of force of this magnitude could be supported under the Resolution without a more acute threat of attack upon the United States from the Cuban bases. The Resolution of 23 October should be construed in the light of changing circumstances and cannot reasonably be taken as *carte blanche* for any degree of violent action however unnecessary and imprudent such action might be. The legality of such action, fortunately, was never put to the test.

An argument is offered by Captain McDevitt, writing in the Navy

¹⁴⁶ See Meeker, *ibid.*, p. 518.

¹⁴⁷ 62 Stat. 1681 (1947) ; *TIAS* No. 1838.

J.A.G. Journal, for an application of force to Soviet vessels based upon a broad construction of the "local disputes" clause appearing in Article 52(2) of the United Nations Charter.¹⁴⁸ Captain McDevitt contends it may be reasonable to construe a "local dispute" as one arising within the geographical area over which a regional agency exercises authority even though states not members of the Organization are involved. This would bring the activities of the Soviet Union in the region described in Article 4 of the Rio Pact within reach of the regional agency.

He also argues that the Quarantine may be considered a measure for "pacific" settlement of the dispute and not the "enforcement action" described in Article 53(1) of the Charter.¹⁴⁹ Captain McDevitt does not suggest a possible extension of the activities of the regional agency under Article 52(2) beyond the geographical area described in Article 4 of the Rio Pact.

It may be urged, however, that power in a regional security organization to resolve a dispute by pacific means should include competence to deal with active elements of the dispute in any area in which the influence of its members can be applied. Permissive exercises of power (through recommendations and coordination) by the Organization of American States over nonmembers in areas beyond those described in Article 4 of the Rio Pact may perhaps be sustained on the theory that the local origin of the dispute confers this authority.

There is a suggestion in the writings of Legal Adviser Chayes and Deputy Legal Adviser Meeker that this may be the direction of development of the analysis of the State Department in cases of this type. Mr. Chayes, for example, refers to the role of regional security agencies as increasingly important due to the creeping paralysis of the Security Council brought on by the veto.

If, as a matter of constitutional development in world security organization, regional agencies will assume much the same function in regional disputes as the General Assembly and Secretary General have assumed in disputes of a global nature, it may be reasonable to

¹⁴⁸ McDevitt, "The U.N. Charter and the Cuban Quarantine," 72 *JAG J.*, 71 (1963). Captain McDevitt also offers an argument based upon collective self-defense. Article 52(2) provides: "The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council."

¹⁴⁹ Captain McDevitt argues that under Security Council practice a measure is not enforcement action when armed force is not *used*—and emphasizes the presence of force without its *use* or direct application during the Quarantine.

view the reach of the regional organization in resolving local disputes by pacific processes as coextensive with that of the United Nations. The proposition is administratively sound. Whether the proposition will gain appreciable support is another matter, although sooner or later legal-constitutional developments tend to follow the path of administrative convenience.

Professor Christol and Commander Davis find in the experience of the Quarantine the emergence of a "lusty new rule" providing an "additional and unique option within the continuum of 'Force in Peace'," allowing an "option of restrained coercion" which will avoid the drastic procedures and consequences built around the concept of "blockade" and also "the strictures and uncertainties" of the pacific blockade.¹⁵⁰ In addition to the self-defense formula, Christol and Davis offer an argument resting upon the affirmative duty of states to maintain international peace and security by acting collectively as a regional security organization.

While not divorced from a theory of collective self-defense, the Christol-Davis argument seems founded principally upon a duty to "police" violent international power exchanges. This duty may be institutionalized in Chapter I of the United Nations Charter. The inquiry has current importance because of the egregious failures of the Security Council as a peace enforcement institution.

4. *Law and the Draft Proclamation: Permissible and Impermissible Coercion*

Professor McDougal and Dr. Feliciano, in their comprehensive effort to give "aggression," "self-defense" and similar descriptions of coercive levels and exchanges, meaning for decision makers, rely in part upon the "just war" concept of the Spanish theologians.¹⁵¹ They relate conceptions of *permissible* and *impermissible* coercion to a defined general community goal denying value reallocations by intense coercion or violence. This relation is accomplished by the use of detailed operational indices keyed to the current structure of global and regional security organization.

Assuming the element of coercion in the transaction is unquestionable, which will ordinarily be the case when major armed strength is deployed, the *permissible-impermissible* "coercion" spectrum affords a logical framework within which shifting facts can be fixed, appraised and rationally related. This analytical structure

¹⁵⁰ Christol and Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962," 57 *A.J.I.L.*, 531 (1963).

¹⁵¹ McDougal and Feliciano, *Law and Minimum World Public Order*, 121-260 (1961).

is adaptable at decision-making levels normally associated with the execution of policies. At the same time, the system can be utilized by high-level policy makers, although its importance at this level, as suggested by Mr. Acheson,¹⁵² is to ensure a rational relation of observable facts and to induce insights into factual relationships.

Working within the general framework of contraposed *initiating coercion*-self-defense contentions, McDougal and Feliciano describe areas in which facts may be found and evaluated to inform a decision maker. These areas include: (1) characteristics of the participants; (2) their objectives, including the range and importance of values sought ("consequentiality"), and the degree of value sharing anticipated ("inclusiveness or exclusiveness"); (3) "modalities"—which might range from the application of armed violence to less coercive techniques—such as those associated with economic warfare; (4) the effects secured—the effects produced in the value and institutional structure of the State upon which the questioned coercion has been exerted and the relation of the intensity of the coercive act to the intensity pattern of coercive exchanges between the states involved; (5) the degree to which community procedures for resolution of the conflict have been utilized or resisted; and (6) the power which can be mobilized to sustain a decision of impermissible coercion.¹⁵³

Whether a self-defense claim for coercion is honored should depend, according to McDougal and Feliciano, upon the necessity and proportionality of the defensive action. The element of *necessity* turns upon the relative power of the states in conflict, the nature of their objectives, the importance of the values conserved and the *reasonableness* of the expectation of necessity. *Proportionality*, likewise, will be based on method, objectives, values conserved and effects of the action.

McDougal and Feliciano summarize coercive actions which they regard as "permissible." These fall into three categories.

The most important because of the high intensity of coercion usually involved and concomitant general risk to nonparticipants, are the self-defensive coercion against a third state, based on the argument of continuing coercion by a principal opponent. Also less critical are assertions of temporary limited authority upon the high seas for defensive purposes. Such temporary limited authority might be asserted in nuclear tests, satellite recoveries, or a "Quarantine."

¹⁵² (1963) *Proc. Am. Soc. Int. Law*, 13, 14.

¹⁵³ McDougal and Feliciano, *Law and Minimum World Public Order*, 167–206 (1961).

In a second category are low-level intensity, nonself-defense coercive exchanges endemic in international relations.

Police measures applied by or under the authority of the organized community of states are in a third category.

To these categories might be added a fourth, perhaps embraced by McDougal and Feliciano within their third category. Within this fourth category are enforcement actions of an interim and stabilizing nature taken by member states pending the decision of an appropriate international organization. Such enforcement would be in *voluntary* discharge of the enforcer's obligations of membership. Action of this type has been discussed in Chapter III, *Situation 3*.

This action may not be of a defensive nature. It bears an analogy to the interim action of an equity court familiar in Anglo-American law.

Included also might be various servicing functions involving coercion, such as coercive gathering of evidence. This evidence might be for consideration by an international organization dealing with security matters¹⁵⁴ or for the use of a state decision maker faced with a possible application of intense coercion.

a. *ELEMENTS TO BE CONSIDERED IN REVIEWING DRAFT PROCLAMATION*

Unlike an analysis of the Cuban Quarantine of 1962, which can be undertaken with the advantage of hindsight, an analysis of the Draft Proclamation (set forth in *Situation 6*) relating to naval interdiction of biological munitions and facilities for their delivery must be based upon certain assumptions concerning the nature of the decisions necessary as the Proclamation is executed. How "reasonable," for example, will be applications of naval force in the "zone of surveillance"?

A series of decisions will be involved—and any plan, no matter how carefully considered, can be executed illegally by officers who misunderstand or ignore it. In the Quarantine, the "persuasive" impact of United States policy was enhanced by moderate applications of power coupled with efforts to obtain agreement with the Soviet Union.

To the extent functions of "planning" and "operation" were not

¹⁵⁴ These actions, exemplified by the Anderson-Heyser U-2 sorties preceding the Quarantine, should be distinguished from the British effort to obtain evidence to support the Corfu Channel claim before the World Court, a "non-emergency" action not considered as "legal" under the circumstances by the Court. *Corfu Channel Case*, /1949/ I.C.J. Rep. 335 (1962).

performed by the President and his deputies, who maintained close control over the quarantining naval units, the legal burden rested principally upon the naval operator. Judicious use of law *after* the basic plan was formulated had much to do with the satisfactory result.

Assuming the Proclamation will be executed obediently and diligently, what questions should be considered with a view to its revision? Stated in functional terms, the areas for appraisal in which law plays a part are these:

(1) Is the plan *persuasive*? The problem of persuasion will begin with the President and will continue with the executive officers who will execute the Proclamation, with the United States electorate, our allies, officials of international organizations, and officials of Scythia and Nueva. The "legitimacy" of an act is a product of persuasion—since the collection of values and institutions we describe as law are in a process constantly of reconstruction.

(2) Does the plan provide adequate guidance for executive officers who will carry it out? The President is responsible nationally and internationally for establishing adequate guidelines and controls over administrative officials. Closely allied is the provision of adequate legal safeguards against personal liability of these administrative officials in the performance of their duties. Suppose a naval officer who executes the Proclamation falls into the hands of Scythian authorities. Does the Proclamation provide a basis for legal arguments in his defense?

(3) Does the plan permit sufficient latitude of action for co-ordination of the United States economic thrust using naval force with reciprocating action by Scythia or Nueva? Interference with the shipment of biological munitions and means for their delivery is economic warfare employed as a primary policy device. There is no intention to overwhelm Scythia or Nueva by the use of armed force.

This being so, it is in the interest of the United States to permit Scythian and Nuevan officials to determine United States intentions with clarity and to provide avenues of withdrawal to these officials when withdrawals are consistent with United States policy. *Co-ordination*, likewise, is closely related to *persuasion*, mentioned as a first area of appraisal of the plan. These areas will now be considered in inverse order—roughly in the order of their importance.

Coordination in the Proclamation

The most essential requirement for *coordination* in economic action is action of a familiar and accustomed pattern. This enhances the

likelihood of a rational response by the opponent along predictable lines. Action to develop *coordination* is consistent with the concept of an "economic sortie." An economic sortie is usually most effective when the target anticipates the point of attack but for geographical or other reasons cannot offer an effective defense.

The general plan of action in the Proclamation, just as the plan of action in the Quarantine of 1962, follows the accustomed outline of Pacific Blockade or "Pacific Contraband." Preferences seem expressed for applications of naval force limited in diversity, limited geographically, and limited in intensity. Scythia probably will not imply from the Proclamation tacit directives for general attacks upon Scythian vessels and supply lines.

While Scythia cannot assume the President will be able to maintain effective control over his executive officers under all circumstances, this control probably can be maintained as in past transactions of this type. These judgments by Scythian officials may lead to a moderate rather than intense Scythian response.

The Proclamation also suggests the coordinating powers of the United Nations are being invoked. Information will be collected to enable the United Nations to perform this task by the use of commissions of inquiry or by use of other available agencies. The International Red Cross was proposed as a fact-finder to determine removal of the missiles from Cuba. This organization might prove acceptable to the United States, Nueva and Scythia, to investigate the storage, experimentation with and use of biological weapons.

It may be assumed the United States will furnish information concerning its activities and findings to the World Health Organization and the Pan American Health Organization as well as to the Organization of American States to bring the influence of these organizations to bear in shaping Scythian and Nuevan responses.

Guidance in the Proclamation

The Proclamation in *Situation 6* shares with the Proclamation issued in the Quarantine of 1962 minimum standards to guide executive officers. An executive officer must expect to engage in economic warfare under a plan assembled somewhat loosely by his superiors.

The Proclamation in *Situation 6*, repeating the wording of the Proclamation of 1962, directs the general method by which vessels of any nationality may be intercepted and searched. It limits the use of force to the extent necessary to secure compliance with the directions of the President and the regulations and directions of the Secretary of Defense.

Unlike the Proclamation of 1962, the proposed Proclamation provides for the diversion of vessels for visit and search to points designated by the Secretary of Defense. This will relieve the intercepting officers at sea from the burden and hazard of searching for easily concealed and dangerous material. It will also permit an investigation in port using impartial witnesses. The Proclamation makes clear that the intercepted vessels are not to be seized as prize but are to be released when biological munitions and equipment found aboard are surrendered to the United States.

While the proposed Proclamation relieves officers at sea from the necessity of action likely to stimulate conflict, it does not and cannot contain directions for all situations arising. Allowance must be made for: (1) lack of foresight by the policy maker; (2) misinterpretation of instructions by the executive officer; and (3) the development of emergencies permitting no time for instructions by superiors.

There is no way in which an executive officer can be excluded entirely as an effective decision maker. Facts are developed by an executive officer determining the direction of a later course of decisions by formal (legal) policy makers.

It is therefore desirable to develop, as an incident to any policy such as that presented in the draft Proclamation, grounds for projected legal defenses of the executive officers involved. The projected defenses, when known to the executive officer, serve indirectly as a form of guidance by providing principles of action to fill the interstices of the Proclamation and instructions issued thereunder.

The draft Proclamation provides desirable machinery by which immediate judgments concerning the action of an executive officer can be rendered. The institutional controls under which he functions normally can provide these judgments in part and will exist no matter what the Proclamation provides.

His naval superiors, for example, will appraise his action. His awareness of the predelictions of these officers serves as an effective guide.

The Proclamation also contemplates diversion of vessels and custody of prohibited materials by the United States under circumstances encouraging negotiation and the settlement of individual cases by agreement. Perhaps naval claims boards can be established to consider claims for economic loss occasioned by interceptions or diversions and provide opportunities for formal decisions concerning the conduct of executive officers in which persons other than naval decision makers can participate.

These formal *contemporaneous* decisions are desirable to protect

the executive officer because the facts reviewed will be substantially those available to him. The interception of *Trent* by Captain Wilkes, discussed earlier in this book,¹⁵⁵ illustrates disadvantages arising from failure to obtain immediate formal settlement of issues produced by naval interceptions.

To minimize the risk of exposure of an executive officer to delayed prosecutions, it is desirable to develop in a "pacific blockade" or "contraband" proclamation a basis for an argument for immunity against prosecution for acts done pursuant to it. The act of state doctrine has been argued unsuccessfully in cases of war crimes and crimes against humanity.

The only basis of immunity which appears available for development is that of an international official. The immunity of an international official is based upon agreement and not custom.¹⁵⁶

Hence it is desirable in the Proclamation to relate the proposed action of the United States to action by the United Nations Organization. The Draft Proclamation does this in two ways. The Proclamation describes the action directed as of an *interim* nature pending action by the Security Council or other organs of the United Nations to preserve peace. Also emphasized is the intelligence function of the naval action—the collection of information for preliminary action by organs of the United Nations.

These interrelationships of United States policy with policies of the United Nations and the Organization of American States are discussed subsequently as they bear upon the element of *persuasion* in the Proclamation. They can, however, be used also as the basis for an argument for immunity of United States officers either under Section 22 of the Convention on the Privileges and Immunities of the United Nations¹⁵⁷ or under the functional immunity provisions of Article 105(2)¹⁵⁸ of the United Nations Charter.

The contention might be that the officer was a temporary official of the Organization performing its functions. The same argument can be offered if the officer acts pursuant to the instructions of a

¹⁵⁵ Chapter I, Fn. 29, *et seq.*

¹⁵⁶ See Hill, *Immunities and Privileges of International Officials—The Experience of the League of Nations* (1947).

¹⁵⁷ See *Yearbook of the United Nations*, 100–103 (1946–47). Article 22 applies to "Experts * * * performing missions for the United Nations * * *." This will be the more difficult of the two provisions upon which to found an argument of immunity.

¹⁵⁸ Article 105(2) reads: "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

regional organization with peace enforcement functions subject to the authority of the United Nations.

Several problems are evident: (1) Can an effective argument be made that an officer acting as an "interim" functionary without express authorization by the United Nations is an expert or official of the Organization? (2) Will acts of a possible criminal nature be held *ultra vires* and beyond the proper functions of a representative of the Organization? (3) To what extent will immunity be recognized by an international tribunal or by the courts of a state not a party to the convention or a nonmember of the United Nations? (4) Assuming functional immunity may be argued effectively under Article 105(2) how long will this immunity continue? The immunity based upon the Convention continues indefinitely. (5) Will the Secretary General waive immunity under the Convention? He apparently cannot waive immunity under the functional provisions of Article 105(2).¹⁵⁹

Difficulties in developing immunity arguments to protect officers causing injuries to persons or property while carrying out their orders pursuant to the Proclamation are obvious. The Proclamation, however, in view of experience with delayed criminal prosecutions since World War II, should lay the foundations for immunity arguments which might be offered.

Persuasion in the Proclamation

The most important feature of the Proclamation to which legal considerations are relevant is its persuasive impact. The major difficulty is to distinguish "justification," which tends to be retrospective and subjective, from the prospective and objective persuasive elements rendering legal institutions effective policy implements and policy guides.

Differing concepts of law and of the requirements of a legal order, as in all East-West conflicts, complicated the problem of persuasion in the Quarantine of 1962. Because the problem of persuasion was complicated, with many different audiences requiring different approaches in argument, Western spokesmen tended to fall back upon arguments urging the "necessity" and thus "justification" for the arms interdiction.

¹⁵⁹ Discussions of related issues may be found in Hill, *Immunities and Privileges of International Officials—The Experience of the League of Nations*, 58–75, 101–119 (1947); Kunz, "Privileges and Immunities of International Organizations," 41 *A.J.I.L.*, 828 (1957); Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," 25 *A.J.I.L.*, 694 (1931).

b. SELF-DEFENSE AND COLLECTIVE SELF-DEFENSE

The legal basis of the Quarantine of 1962 preferred by most commentators upon the subject appears to have been the necessity of self-defense or collective self-defense.¹⁶⁰ As an abstract legal proposition, it has been generally accepted that a state may resist by employing force proportionate to an imminent threat to its territorial integrity or political independence.¹⁶¹ The decision to employ force must be reasonable under the circumstances attending the threat. *Provisional* or *interim* decisions to use force for defensive purposes seem admissible when the necessity is clear to the state officials responsible for acting and the decision made and executed conforms to the United Nations Charter.

The Draft Proclamation in *Situation 6* suffers from the disadvantage that no Resolution of the Organization of American States can be used to support it. Quite probably, if the policy expressed in the Draft Proclamation is accepted by the President, efforts will continue to secure the support of that Organization.

But since the naval action proposed is intended in part to produce intelligence which might induce the Organization to act, it will be imprudent to delay action pending a resolution of support by the Organization as was done in the Quarantine of 1962.

This difficulty will limit the use of arguments such as those advanced by officials of the State Department to support the Quarantine.¹⁶² Required instead will be arguments to support initially unilateral action by the United States.

The Executive Committee advising the President concerning the Quarantine of 1962 was clearly persuaded to reach its judgment and render its advice by factors in addition to law. This should not obscure, however, the very significant function of law as an institution for persuasion. To the extent law does become relevant in decisions of this nature, in which values of a civilization are at stake, the persuasive function of law is its dominant function. This function dominates from the factual analysis and discussions preceding the authoritative or basic decision through the network of decisions involved in its execution.

¹⁶⁰ See Fns. 137-141, *supra*.

¹⁶¹ Eloquent expositions of the customary doctrine with supporting records of practice may be found in Bowett, *Self-Defense in International Law*, 8-27 (1958); Brownlie, *International Law and the Use of Force by States*, 251-79 (1963); McDougal and Feliciano, *Law and Minimum World Public Order*, 217-32 (1961). See also Stone, *Legal Controls of International Conflict*, 243-246 (1954) where the self-defense doctrine and its possible limitations by Article 51 of the United Nations Charter are considered.

¹⁶² See Fns. 140, 141 *supra*.

At the basic policy-making level, for example, when the President makes his decision concerning the Draft Proclamation, the persuasive function of law is confined in the main to legal analytical method to be applied in selecting the appropriate means to attain the desired end. This end is maximum feasible preservation of the physical and other values of people with whom the decision maker identifies.

Acceptance of this end is coerced—both by formal allocations of responsibility in domestic constitutional provisions and by practical allocations of power within the political system.

The identification also is coerced, although an identification pattern is difficult to maintain due to diverse pressures upon the decision maker. The *effective end* and the *formal identification* are “nonnegotiable.”

In a selection of *means* the decision maker may be persuaded. It is convenient at this level of policy making to persuade in a contraposed initiating coercion-self-defense context such as that set forth by Professor McDougal and Dr. Feliciano.¹⁶³

The difficulty arises as the policy is carried into execution. In this context, the arena in which legal processes of persuasion must be employed is broadened. Thirty years ago the reactions of one's allies, acquaintances and enemies could be disregarded in action of the type carried out in the Quarantine of 1962 and contemplated in the Draft Proclamation. Today, favorable responses from the officials of these states may determine the success or failure of limited coercion.

Unhappily a paradox exists. The self-defense (or collective self-defense) formulae, meaningful in a formulation of the basic policy and in obtaining domestic support for it, are less persuasive to officials who consider themselves removed from the value dislocations in the conflict or who consider their values so implicated that a defense by the United States carries a direct physical threat to them. The problem is one of perspective—sometimes of abstraction or detachment—sometimes of involvement—but in each case an egocentric reaction.

It was difficult, for example, for some of the leaders of new states in the third or fourth rank of powers at the time of the Quarantine to accept the unwillingness of the United States to rely solely upon discussions before the United Nations to solve its problem of defense. If the United States, as its propaganda suggested, could batter Cuba into a necklace of smoking and toxic lagoons lying

¹⁶³ See McDougal and Feliciano, *Law and Minimum World Public Order* (1961).

generally between the Florida Straits and the Windward Channel, why provoke the Soviet Union by naval interference with its shipping?

The value placed by the United States upon human lives and the responsibility for avoiding nuclear war which rested upon its officials could not be appreciated fully by officials in other states in which the well-being of citizens beyond the official class was not a major value. These officials might view an enemy simply as an object for destruction. Their un verbalized concepts of "self-defense" might be narrow.

The un verbalized concept of self-defense presents a special problem—varying somewhat from culture to culture—depending upon the concept of the "self." The un verbalized concept of self-defense of the decision maker to be persuaded by legal "defense" arguments might be appraised and his response harmonized with the goal sought by a policy advocate by the play of relevant facts within his attention frame.

Where the un verbalized concepts of self-defense (the unstated ethical limits imposed upon action to preserve life) are mutual, defensive arguments are most effective. When Secretary Webster presented his well-known, and embarrassingly narrow, argument concerning permissible self-defense to Lord Ashburton in the *Caroline*,¹⁶⁴ he simply refurbished an argument with which he had probably dealt in homicide cases as a trial lawyer a dozen times in the courts of New Hampshire and Massachusetts. He could be confident the British would accept his formula because the idea was derived from British common law. The differences that arose were in applying the formula to the facts.

It is easy for the official unwilling to support a state offering a self-defense argument to articulate reasons for rejecting it on factual grounds. All viable states seek values. In this sense they act offensively. Any viable state will maintain a positive or offensive front against all out-groups while seeking (defensively) to minimize internally the conflict this offensive action against out-groups produces.

This does not mean that a state assumes the offensive with all policies or that all offensive policies are coercive. No state com-

¹⁶⁴ 2 Moore, *Digest*, 217, at 412 (1906): "Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation'."

mands the values permitting coercive offensive action along its entire policy spectrum at any given time.

An active expenditure of values, the expenditure increasing with emphasis upon coercion, must be supported by policies tending to conserve values. Policies directed *principally*, although not necessarily *exclusively*, to the conservation of values, tend to be described as *defensive*. Policies directed *principally*, although not necessarily *exclusively*, to the acquisition or destruction of values possessed by another state tend to be described as *offensive*.

When this descriptive framework is used, no state, even the most lawless in its international relations, can be said to act wholly offensively or not in self-defense. To the unreceptive decision maker, the self-defense argument is a "rope of sand"—since this decision maker can always point to offensive features in actions primarily defensive.¹⁶⁵

¹⁶⁵ A matter also to be considered, but one not disturbingly pressing at the present time, is the cyclic linkage of defense with virtue and offense with vice which can be observed in the history of Western Europe and America. The specialist in rectitude or other molders of opinion have at times put forward coercive aspects of offense as a virtue when either the value position of the actor is threatened or a goal to enhance that position attained effectively by coercion is offered or defined.

The refurbishing of offensive action to develop a patina of respectability affects profoundly the thinking of the masses these leaders influence. To cite the experience of the Roman Church in Western Europe—the virtues of defense or preservation of the *status quo* were preached as the Church struggled to consolidate its hold on values inherited from the ancient Roman State. The man of the medieval world was exhorted to bear his many afflictions, physical and political, with grace and fortitude in the hope of a more congenial spiritual future.

The rebel, the heretic, the challenger of convention—the "man on the offensive," found the doors of medieval society, dominated by the Church, closed to him.

Faced by internal political division and under the pressure of secular rulers, the Church later sponsored or encouraged a series of crusades in which offensive policies were dominant. The medieval misfits, the "men on the offensive," now often valued crusaders, found a temporary abode in the religious military establishment. This same offensive power was later directed to the internal ordering of the Church as the Crusades drew to a close with once valued crusading orders, such as the Templars, coercively liquidated.

There may now be in the making a reorientation of American opinion concerning offensive action. The general acceptance and support of the Quarantine of 1962 may be a manifestation of this changing viewpoint.

For over fifty years the people of the United States have enjoyed a preferred value position. Not only has this preferred value position inculcated in the electorate an abounding regard for the *status quo*, but mass communications, driving home to Americans their not entirely explicable position upon an island

This difficulty in the use of self-defense arguments in persuasion to implement the execution of a policy such as that proposed in the Draft Proclamation, suggests the need for coupling self-defense arguments (which are most persuasive when directed to the basic decision maker and the persons he represents) with arguments which appeal to "detached" or "involved" officials in other states.

*Self-Defense and Collective Self-Defense Applied
to the Draft Proclamation*

Analyzing the Draft Proclamation and the facts stated in *Situation 6* in a "self-defense" perspective, assuming action by the United States will be unilateral, and using the specific criteria related to "necessity" and "proportionality" described by McDougal and Feliciano,¹⁶⁶ a stronger legal case can be made for the action contemplated in the Draft Proclamation than for the action conducted in the Quarantine of 1962.

Little data is presented in *Situation 6* concerning the power of Scythia. Assuming Scythian power is comparable to that of the Soviet Union, and it has a thermonuclear as well as a biological warfare capability, the necessity of United States action is urgent. The proportion of its coercive response by naval force to the initiating coercion by Scythia is reasonable. While the area of zone of surveillance embraces Nueva, the naval action contemplated is against Scythian provision of biological munitions and the means for their delivery.

The action by the United States tends to conserve its values. Specifically and immediately the major value sought is physical

of plenty amidst want, have stimulated guilt complexes of a type conducive to defensive psychology.

There are signs of a growing restlessness. An interest in offensive action increases as the value position of the United States in rectitude, respect, affection, power and even wealth is eroded by the effective implementation of demands in other areas of the world.

As specialists in violence, military and police, gain ascendancy, the importance of offensive military action, as contrasted with defensive-holding strategy, is likely to be promoted. It is a fair assumption that if changes of this sort occur both at the "grass roots" and also in influential political echelons, the changes will be reflected also in nonmilitary judgments such as in voter or judicial decisions concerning the "legality of offensive action."

A trend of this type occurred in France prior to World War I when the offensive psychology, advocated in the military environment by Grandmaison and Foch, permeated beyond the military confines into French domestic politics and foreign policy.

¹⁶⁶ See McDougal and Feliciano, *Law and Minimum World Public Order* (1961).

well-being of its citizens. Due to the difficulty of containing the effects of biological weapons, demonstrated by Scythian experiments at Farrago and the apparent Nuevan attack upon Antioka, the United States action has an *inclusive* objective. The United States acts to conserve the values of peoples in the Caribbean area and perhaps an indefinite area beyond that designated for the operations of the United States naval forces.

Values of Scythia are unaffected in any appreciable sense by the United States action. The Scythian effort to extend its values, particularly power, may be frustrated by the United States action contemplated. But existing Scythian values are not diminished.

The action may work to the advantage of inhabitants of Nueva by limiting the introduction into that territory of biological weapons.

Although a biological attack by Nuevan units might not cripple the United States, in the sense that a thermonuclear attack could destroy vital population and communication centers, the precise impact of biological weapons cannot be estimated in advance. The physical well-being of its citizens is a major value sought through in the organization of any state. The obligation of a state to protect this value from erosion by disease, and the network of mutual obligations among states to limit the spread of communicable diseases, have been recognized since the 17th century. The obligation has been expressed in modern Sanitary Conventions since 1851.

The action contemplated by the United States is naval action with an economic objective—interrupting a flow of offensive material to and from Nueva. With a resort to pressure in diplomacy by posing a threat of biological attack, Scythia has injected an element of coercion which cannot be met in any effective sense without countercoercion.

Sea police or quarantining forces, typically coast guard or customs units, are used routinely in enforcing sanitary regulations. In this instance the breach of sanitary regulations threatened is massive and concerted. Using naval force on the high seas to meet this threat is the minimum exercise of a long settled and traditional right and obligation to repel disease.

The action, furthermore, is similar to pacific blockade or “pacific contraband.” There is nothing deceptive in the interception of biological munitions and means for their delivery which might tend to provoke a major Scythian counterstroke. The pattern of United States action is settled and familiar—as was the naval interception in the Cuban Quarantine of 1962.

Tight control can be maintained over the naval units. The ship

and aircraft commanders will be familiar with international legal doctrine pertaining to their duties.

Alternatives to the action contemplated are direct diplomatic negotiations or negotiations through the United Nations. Attacks also may be made upon the biological munitions depots in Nueva or the trawlers by which the munitions are delivered or both. These attacks might be launched by Antiokan forces with United States logistical support or by units of United States Strike Command.

If the latter forces are employed, an assault might be made by airborne units upon the depots. This assault would have to be coupled with neutralization of Nuevan armed forces in the area. The trawlers can be destroyed by United States naval forces if necessary.

The difficulty of the Organization of American States in reaching a decision concerning Nuevan biological warfare suggests the limitations upon diplomatic negotiation under these circumstances. Probes other than by reconnaissance aircraft are needed to furnish information upon which negotiations can proceed.

There is no indication that economic pressures, such as trade restrictions, will have appreciable effect upon Salvaje.

The use of direct armed violence against the trawlers or against the munitions depots might bring a similarly violent response from Scythia. Such attacks by the United States are undesirable unless an attack upon the United States is imminent.

Interference with both the buildup of supplies of biological munitions in Nueva and the deployment of delivery means is the most effective means to lay the groundwork for settlement of the problem through negotiation. It is also the most moderate use of force to attain this end. Such action by the United States is proportionate to the initiating coercion.

The reasonableness of the expectation of necessity by United States decision makers will lend force to the persuasive element of law in the situation. Has the basic decision maker (the President in this case) considered and interrelated the facts bearing upon the confrontation? Will other decision makers conclude he has given the *proper* emphasis to the *proper* facts? Or will they conclude he had ignored or has not had access to facts which should have been considered? What deference has been given to legal institutions such as treaties to which the United States is a party and the obligations of international organizations of which the United States is a member? An initial decision concerning the necessity of the action by officials of a threatened state may be made; but this decision is subject to reappraisal in a general community perspective by other decision makers.

The National Security Council has reviewed the Scythian threat against a background of experimentation with and active use of biological weapons by Nueva and Scythia. Scythia may be subject to no international legal obligation to refrain from the use of biological weapons in actual warfare or the deployment of delivery means for diplomatic pressure. However, the use of these weapons, which Scythia may contemplate, is in direct conflict with the demand of the general community to limit the spread of disease. Certainly, Scythia and Nueva have violated their obligations under Article 2(4) of the United Nations Charter by a threat of force against the territorial integrity and political independence of the United States. Sufficient facts provide the basis for an estimate that biological weapons will be used by Scythia and Nueva against the United States if an opportunity is afforded.

Article 51 of the United Nations Charter

To what extent does Article 51 of the United Nations Charter (1) limit the defensive action which may be taken by a decision maker when the necessity is reasonably found to exist, or (2) qualify the degree of necessity which the decision maker must find before action is taken? Two approaches can be made in construing Article 51.

The intention of the parties to the Charter at the time of ratification may be sought. Guides in the search for this intention may include records of discussions as the Charter was prepared at Dumbarton Oaks and San Francisco and the wording of Article 51. Most lawyers and political scientists favor this traditional approach in construing Article 51—although these commentators differ in the context which they will consider in determining intent.

Alternatively, in a manner alien to the normal legal method in construing instruments, Article 51 can be construed to implement the work of the kind of institution the United Nations has become in the General Community. This current role is not one foreseen by the original members. A functional construction places little emphasis upon the intention of the parties in 1945 and relies instead upon the character of the current operations of the Organization.

Committee compromises and legislative statesmanship combined to produce in Article 51 general statements of the initiating and reciprocating coercion upon which the Article focused. The basic limitation on the use of force, keyed to objectives or ends denied when sought by forceful means, was established in Article 2(4) of the Charter.

Article 51 was introduced into the Dumbarton Oaks draft at

San Francisco to accommodate the demands of states without permanent membership on the Security Council. These apprehended embarrassment of their possible defensive measures by the veto. They wished to insure their ability to rely upon regional security arrangements such as those envisioned in the Act of Chapultepec¹⁶⁷ and the Pact of the Arab League.¹⁶⁸

In 1945 the form which these regional security arrangements or nonregional alliances might take was speculative. Also no one could know whether the Security Council would or would not measure up to its peace preservation responsibilities. Consequently, ambiguity in Article 51 was then and is now a positive virtue. It was a type of shelter which would enable members to survive the wreckage of the Organization if this in fact occurred.

Most of the difficulty arising under Article 51 as applied to the United States action in the Cuban Quarantine of 1962 and as it might be applied to the action contemplated in the Draft Proclamation in *Situation 6* derives from assumptions: (1) that all measures of self-defense or collective self-defense are keyed to "armed attacks" and (2) that "armed attack" has a limited or special meaning.

Professor Quincy Wright and several other commentators have construed the words "armed attack" narrowly to exclude the prior planning of an attack and the "threat" of force.¹⁶⁹ Until the armed attack is "actual," presumably when missiles are launched and armed forces are deployed and in motion, there can be no *military* response in self-defense or collective self-defense. Professor Wright seems to conclude that defensive measures not involving military action are permissible against threats of force less than armed attack.¹⁷⁰

The usual legal approach to the interpretation of any treaty, charter or statute, however, is that any word is "ambiguous." The interpreter can look to an extent to the extrinsic circumstances to find its meaning.

As stated by McDougal and Feliciano:¹⁷¹

¹⁶⁷ IX Hudson, *International Legislation*, 283 (1942-45) No. 647.

¹⁶⁸ *Ibid.*, 300, No. 650.

¹⁶⁹ Wright, "The Cuban Quarantine," 57 *A.J.I.L.*, 546 (1963); Wright, "The Cuban Quarantine," (1963) *Proc. Am. Soc. Int. Law*, 9; Standard, "The United States Quarantine of Cuba and the Rule of Law," 49 *A.B.A.J.*, 744 (1963). See Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," 41 *A.J.I.L.*, 872 (1947); Nincic (Reply) in Schwarzenberger, "Report on Some Aspects of the Principle of Self-Defense in the Charter of the United Nations" (International Law Association, 1958), 68.

¹⁷⁰ Wright, "The Cuban Quarantine," 57 *A.J.I.L.*, 546, 563 (1963).

¹⁷¹ McDougal and Feliciano, *Law and Minimum World Public Order*, 234 (1961).

* * * /N/ either Article 51 nor any other word formula can have, apart from context, any single 'clear and unambiguous' or 'popular, natural and ordinary meaning' that predetermines decisions in infinitely varying particular controversies.

All the relevant variables of the particular context should be considered.

Nothing will be found in the wording of Article 51 to indicate with clarity the meaning of "armed attack" or the corollary inherent right of individual or collective self-defense. Meanings assigned to these categories in a particular context must be derived from other provisions of the Charter, from events contemporaneous with the drafting and ratification of the Charter, and from supervening experience in interstate and international organizational relationships to the time of interpretation.

It has been argued that Article 2(4) of the Charter is an absolute prohibition on the use of force for any purpose, that any use of force was to be authorized by the Organization, and that the right of individual or collective self-defense is retained subject only to the permissive ambit of action permitted in Article 51. By this view, self-defense is now the exception, and its scope depends upon the interpretation of Article 51.¹⁷²

This position is derived from a misinterpretation of Article 2(4). This Article refers to initiating coercion—threats against the territorial integrity or political independence of a state or in a manner inconsistent with the Purposes of the United Nations or action by force to attain these prohibited ends.

A basic prerequisite to continuation of the Organization, as of any political group, is security of its members. This is expressed in Article 1(1) of the Charter. With a diminished right of individual or collective self-defense, the security of members of the Organization would be jeopardized.

The point is clarified when the obligations of members *versus* nonmembers of the Organization are considered. Article 2(4) appears to extend to a threat or use of force against a nonmember. Article 51, on the other hand, does not apply to a nonmember; and it is difficult to construct a theory upon which parties to the Charter could limit the inherent right of self-defense of a nonmember.

In Article 35(2) there is an implication that obligations of pacific

¹⁷² See Brownlie, *International Law and the Use of Force By States*, 272–275 (1963) where the various arguments are spelled out in detail. Professor Brownlie concludes at page 275, somewhat equivocally, that " * * * Article 51 is not subject to the customary law /of self-defense/ and that, even if it were, this customary right must be regarded in the light of state practice up to 1945."

settlement are not binding upon nonmembers unless these are accepted in advance for the purpose of a particular dispute brought before the Security Council. Could the draftsmen of the Charter or the ratifying states have intended to discriminate against a member by putting it to disadvantage in its security relations with a nonmember?

Consider the current position of the Soviet Union *vis-à-vis* Communist China or West Germany. It seems generally conceded that by the customary law under some circumstances there is an anticipatory right of self-defense—the right of a “preemptive strike.” A number of commentators have argued stoutly that no such anticipatory right exists under Article 51.¹⁷³ If these commentators are correct can Article 51 be taken as the exclusive source of the “inherent” right of self-defense of a member? An affirmative answer would seem to derogate from a basic purpose of the Organization.

The rights of self-defense and collective self-defense of members and nonmembers must be the same for the rational administration of any system of peace enforcement. Members may agree to refrain from initiating coercion, as they have done in Article 2(4) while no such obligation is sought to be imposed by the Charter upon nonmembers.

Professor Bowett,¹⁷⁴ McDougal and Feliciano,¹⁷⁵ and others¹⁷⁶ consider a customary right of self-defense to exist apart from Article 51. Professor Stone appears to share this view, although he doubts the existence of a collective self-defense doctrine as part of the customary rule.¹⁷⁷

Indeed, differences as to the precise limits of the customary doctrine at any particular time complicate all interpretations of Article 51.¹⁷⁸ Differences also exist as to the degree, if any, the provisions of Article 51 qualify the customary rules.

¹⁷³ *Ibid.*, 275–278.

¹⁷⁴ Bowett, *Self-Defense in International Law*, 184–185 (1958).

¹⁷⁵ McDougal and Feliciano, *Law and Minimum World Public Order*, 232–241 (1961).

¹⁷⁶ E.g., Goodhart, “The North Atlantic Treaty,” /1951/ *Recueil des Cours* (II) 187, 192; Seligman, “The Legality of the U.S. Quarantine Under the United Nations Charter,” 49 *A.B.A.J.*, 142 (1962); Waldock, “The Regulation of the Use of Force by Individual States in International Law,” /1952/ *Recueil des Cours* (II) 455, 496–498.

¹⁷⁷ Stone, *Legal Controls of International Conflict*, 243–246 (1954).

¹⁷⁸ Professor Brownlie, for example, takes the position that if an international legal custom of self-defense operates in conjunction with Article 51, this custom must be that which existed in 1945 rather than that existing in 1920 or earlier. Assuming clear distinctions can be made between elements of the custom at these various dates, it is somewhat curious to consider that the operation of

The records of preparatory work on the Charter concerning both Article 51 ¹⁷⁹ and Article 2(4) ¹⁸⁰ indicate an intention to retain the customary doctrine with no enhancement of the degree of necessity by the inclusion of Article 51. Furthermore, at the time of both the Dumbarton Oaks and San Francisco discussions an "armed attack" was generally understood as a process by which the initiative was seized by violent physical power applied by air, land or sea forces. The survival of the people attacked depended upon their ability to seize the initiative by an armed counterattack.

World War II demonstrated repeatedly at the Maginot Line, Bataan, Warsaw and Stalingrad that no defending force can hold a point indefinitely under the fire of modern weapons.

The "armed counterattack" was the key link in the problem of escalation—the major concern of the Security Council in preserving peace.

No Charter authority was necessary to authorize establishment of minefields or other obstacles to vessels, vehicles or personnel.

The likelihood is that the individual and collective measures mentioned in Article 51 were armed *attacks* which could be mounted only to counter an "armed attack." The customary principles of individual and collective self-defense continued to operate as to defensive measures, military or not, whether an armed attack was made or not.

There remained to the member states a spectrum of coercive acts to be applied for defense, whether military means were employed or not. There is no basis for an assumption that all defensive measures are keyed in Article 51 to "armed attacks"; that a military defensive response is by reason of its *military aspect* a defensive measure keyed to armed attack; or that an armed attack "occurs" only when missiles are launched or forces deployed and set in motion against an enemy.

In reconciling Article 51 with action taken in the Quarantine of 1962 and the action proposed in the Draft Proclamation, it is un-

any custom other than that considered to exist when the question requiring interpretation of the Charter arises would be relevant. The current content of the custom, the requirement of necessity and proportionality, for example, is determined by contemporary weapons systems, strategies, tensions and similar physical factors as well as by treaties in addition to the United Nations Charter. See Brownlie, *International Law and the Use of Force by States*, 275 (1963).

¹⁷⁹ 12 U.N.C.I.O. 680-2; Goodrich and Hambro, *Charter of the United Nations*, 297-9 (2d Ed., 1949).

¹⁸⁰ Report of Committee 1 to Commission I, 6 U.N.C.I.O. 446, 459; Verbatim Minutes of Fifth Meeting of Commission I, 6 U.N.C.I.O. 202, 204.

necessary to rely upon a doctrine of anticipatory self-defense, although this element of the self-defense doctrine would appear to be preserved by Article 51 when an armed attack is recognized as a process (an interacting chain of events) rather than a single event. Such a construction seems mandatory in an era of missile, nuclear and biological warfare.

The naval action contemplated in the Draft Proclamation is not an armed counterattack. It is an application of power by military means to limit a threat of force and permit the working of persuasive processes. The fact that an application of military power is involved, far from infringing some unwritten prohibition in Article 51, insures instead close administrative control of the naval units and a consciously proportionate response. Neither the doctrine of necessity as relevant to the Draft Proclamation nor the naval means for executing the plan appear to be modified by Article 51.

The amount of conflict which has arisen concerning Articles 2(4) and 51 and their bearing upon self-defense and collective self-defense, suggests the weight of the burden resting upon lawyers who seek to develop meanings from words using techniques applied in the treatment of domestic commercial instruments, statutes and constitutions.

In the current and continuing state of flux in the power, efficiency and influence of global and regional security institutions, one cannot assume that canons or principles of construction (or even the premises underlying construction) can be applied rationally under conditions approaching constitutional chaos in the international arena.

It may be, for example, that the same techniques for construction should not be used for all articles of the United Nations Charter. Those dealing with trusteeships and economic and social problems might be treated differently from those dealing with peace maintenance.

This is not in keeping with the well-settled approach that construction of a statute, treaty or charter should seek *intent* and that the construction should be *unitary*—that is, the articles should be construed to stand together, in relation to each other, and the same principles of construction should be applied potentially to any article.

The argument for casting aside traditional techniques in dealing with the peace maintenance articles of the Charter is believed to rest upon two conditions.

First, is the shift in the peace-protecting functions of the United Nations from “policing” and “enforcement” to “rheostatic activity.”

The dominant peace preservation function, as understood in 1945, has been implemented by the subsidiary function of "intensity reduction" and not principally by the subsidiary functions of investigation, adjudication and enforcement. The latter three functions are by no means unimportant, particularly in uncommitted areas where efforts are made to avoid conflict among the major powers, as in the Congo. But even in these cases it seems quite clear that enforcement action by the global organization in no way approaches the potential efficiency of enforcement by a regional security organization in which a single powerful state may assume leadership.

A second condition is development of a skein of practice in almost a half century of experience with international security organizations which furnishes a basis for an accurate judgment of the degree of intensity in coercive exchanges which these international "rheostats" can accommodate. The basic problem is one of escalation of violence.

An element of myth inheres in discussions of escalation of violence by apprehensive commentators upon the perils of nuclear armament. Among major nuclear powers with modern military communications and adequate control over their military striking forces, the chance of an escalation of violence beyond a stage desired by the opposing decision makers is approximately zero. A major armed strike by one of these nuclear powers against the other, involving the delivery of major conventional or nuclear demolitions, will be met by an equally devastating response.

But the major problem involving escalation is presented among powers of the second or third range—for example, between Red China and India; Pakistan and India; the Arab States and Israel; Algeria and Morocco; and Indonesia and Malaysia. It is among these states that the significant peace enforcement problems of the United Nations and regional security organizations presently arise and will continue to arise in the foreseeable future.

A workable rough rule of thumb for permissible coercion under the United Nations Charter involves two features:

(1) The first is an estimate of the concomitant ability of the world organization and the supporting regional security organizations to diffract the physical features of the coercive exchange and project the conflict on a verbal level. An accurate judgment can be rendered on this point by a decision maker with even modest intelligence resources.

(2) The second is cooperation with the United Nations or regional security organizations in moderating the intensity of coercive ex-

changes and in altering the nature of the exchanges to develop persuasive features. Coercion is presumptively permissible when the first feature is satisfied and impermissible when not. The action following the decision to coerce, the second feature, is critical in supporting or rebutting the presumption raised.

Articles 2(4) and 51 when construed in the light of the functional approach suggested, set maximum and minimum limits upon increases and decreases in permissible coercion. Implicit in the formula is the proposition that reduction in the efficiency of the global and relevant regional security organizations as "coercive rheostats" reduces the ambit of permissible coercion. Increases in the efficiency of these organizations increase the permissive area for coercion.

Lewis Carroll would have been pleased with the idea of a municipal police system in which the gravity of crimes depended upon the efficiency of the police. This would throw personal liberties in any constitutional system into limbo—and confuse the police as well. If the police were weak, a parking ticket would be a heinous offense, although nothing much would be done about it—with a Gestapo, a murderer might be reprimanded.

With contemporary international security systems, however, we no longer deal principally with police or with crimes until we reach the "particularization" of law to the lower echelon decision maker. Instead, at the higher operating levels we deal principally with rheostats moderating coercion. An approach such as the one suggested, which would clearly create chaos in a well articulated legal order, may create order under conditions approaching chaos.

The formula also embraces a tacit double standard. Given the same degree of efficiency of the global and relevant regional organizations major nuclear powers will enjoy a greater range of permissive coercive practices than powers lacking the internal controls to prevent an escalation of violence. This treatment, however, is no more arbitrary than that current in some world circles. Violent seizures by ex-colonies of the territories of colonial powers are tolerated. Reprisals by the "losing" state are characterized as aggressions.

By the formula suggested a maximum limitation upon coercion is set by Article 2(4) of the United Nations Charter. Despite a decrease in the efficiency of global and regional organizations, or the operation of the double standard, force cannot be threatened or used against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations. Functionally, coercive exchanges meeting the test of the first feature of the formula would appear to be "peaceful"

means used as described in Article 2(3) "in such a manner that international peace and security and justice, are not endangered."

Despite an increase in the efficiency of these organizations, the self-defense safeguard, individual or collective, in Article 51, permits an adequate coercive reaction to meet an "armed attack."

Treatment of this sort does not, of course, eliminate the need for determining the meaning of "armed attack" in Article 51 when responsive action of a high intensity of coercion exceeds the "rheostatic efficiency" of the global and regional security organizations. The treatment simply resets the relevance of Articles 51 and 2(4) in the light of the currently dominant security function of the world and regional bodies.

Using this approach in construing Articles 2(4) and 51, the coercive action in the Quarantine of 1962 was well within the permissive range. The United Nations demonstrated its ability, largely through the office of the Acting Secretary General, to mediate the dispute and secure a resolution of the issues by persuasion. This result was facilitated by the close cooperation of the United States with the United Nations. Assuming moderation in executing the policies expressed in the Draft Proclamation, the Draft also is compatible with Articles 2(4) and 51.

The rule of thumb suggested places emphasis upon three of the several criteria offered by McDougal and Feliciano in their characterization of "aggression" and "self-defense." These are the "inclusiveness" or "exclusiveness" of the objectives of the participants¹⁸¹ and the willingness of the participants to accept community procedures for the settlement of their differences,¹⁸² both being emphasized in the second feature of the rule of thumb; and expectations about the effectiveness of community decisions,¹⁸³ emphasized in the first feature.

Because of the speed in the making of decisions usually required to develop maximum coercive effect, a series of simple standards, if these play down the ultraindividualistic element in self-defense—although clearly falling short of a comprehensive analysis, may serve as an effective *guide* at a high-policy level. Perhaps the *coordinating* functions of the standards are superior to a more comprehensive statement of criteria in which multiple elements provide greater latitude for difference. With respect to decision makers who believe themselves removed from the threat calling for a coercive

¹⁸¹ McDougal and Feliciano, *Law and Minimum World Public Order*, 182 (1961).

¹⁸² *Ibid.*, 203.

¹⁸³ *Ibid.*, 206.

response, the *persuasive* function perhaps is performed more efficiently than when "self-defense is emphasized."

WHO and the Health Regulations

Apart from Articles 2(4) and 51 of the United Nations Charter, the only treaty provisions bearing upon the legal "persuasiveness" of the Proclamation policy are the WHO Health Regulations.¹⁸⁴ These Regulations are a unique treaty form.

The World Health Assembly, consisting of representatives of members of the World Health Organization and meeting at regular intervals, considers International Health Regulations drafted by an appropriate body of WHO with the assistance of the Secretariat. Upon adoption by the Health Assembly, the Regulations are notified by the Director-General to the governments of the member states. After the expiration of a fixed period, three months in Health Regulations No. 2, now in force, the Regulations are binding upon a state which does not reject or file reservations to them. No reservation offered is valid unless accepted by the World Health Assembly.

Current Health Regulations No. 2 have three salient features: (1) The Regulations are aimed principally at a group of "quarantinable" diseases—plague, cholera, yellow fever, smallpox and typhus. (2) The quarantine measures set forth in the Regulations are the *maximum* which a state may apply. (3) The administration of the Regulations is decentralized to regional and national health administrations.¹⁸⁵

The Regulations have no specific security escape clause such as may be found in GATT. The sanitary measures specified are to be taken in the territory of the state which applied them. The Regulations state that sanitary measures shall be applied by a state to any ship which passes through its territorial waters without calling at a port or on the coast.¹⁸⁶ There is no provision authorizing interference with vessels on the high seas for sanitary reasons.

Article 28 permits the health authority of a state to prevent the discharge or loading of cargoes or taking on food or water at a port or airport by a vessel or aircraft which is infected by an epidemic disease other than the "quarantinable" disease "in the case of an emergency constituting a grave danger to public health." It is possible that an argument of limited viability might be constructed upon this Article for interceptions of vessels upon the high seas

¹⁸⁴ WHO Official Records, No. 37, p. 329 (1952).

¹⁸⁵ See Berkov, *The World Health Organization, A Study in Decentralized International Administration* (1957), *passim*.

¹⁸⁶ Health Regulations No. 2, Art. 32(1).

with a purpose of shore contact. The argument would be similar to the "hovering" argument urged in cases of revenue and immigration enforcement.

The most satisfactory approach, however, is to argue the Regulations are developed to reconcile the demand for security and physical well-being unimpaired by the quarantinable diseases with the demand for a free flow of commerce. Trawlers prepared to deliver contaminated aerosols from a range of 600 miles are not commercial vessels within the purview of the Regulations or engaged on a commercial mission. The Regulations do not contemplate intentional initiations of epidemics; nor are mutants of quarantinable diseases developed for the purpose of warfare the quarantinable diseases to which the Regulations apply.

A self-defense exception seems readily implied in the Regulations when the difficulty of detection of attack is as great as in biological warfare and the opportunities are limited for successfully controlling epidemics produced by mutants once these epidemics are initiated.

It is quite probable that the Health Regulations, instead of presenting an obstacle to the policy contemplated in the Draft Proclamation, can be used to supplement the measures initiated by the United States in response to the Scythian and Nuevan threats. Notices concerning intelligence gathered during the proposed interception should be furnished to the World Health Organization pursuant to Part II of the Regulations. This epidemiological information will then be disseminated among the members.

Likewise, the World Health Organization may be used as a source of intelligence to aid in determining Scythian and Nuevan intentions. If Nueva can be designated as an infected local area, the quarantine provisions which then may be put into force against its vessels and aircraft and supplement to a limited extent the naval pressure exerted against shipments of biological weapons and the means for their delivery.

Interim Action to Preserve the Status Quo

As a persuasive device to be offered in addition to arguments keyed to self-defense or possibly collective self-defense, an argument presenting the action as an *interim status quo* preserving technique should be addressed to decision makers not involved directly in the conflict but who possess the power to embarrass execution of the United States policy. This argument has been developed in detail in Chapter III (*Situation 3*).

The interim action contemplated is narrower than the "policing" concept offered by Christol and Davis in their analysis of legal

problems in the Quarantine of 1962.¹⁸⁷ The interim action suggested is noncompetitive with the peace maintenance functions of the United Nations and is progressively reduced as the influence of the world organization is brought to bear.

The concept is one of a power implied in every political or legal system—namely the use of force formally or informally organized to forestall intensive coercion until an authoritative community decision can be rendered. In this context, for example, the action of the United States in Lebanon and in the Quarantine of 1962, in both cases harmonized with the peace maintenance efforts of the United Nations and contributing to that effort, compares favorably with the Anglo-French action in Suez in 1956 during which Security Council action was blocked by a British veto.

Applying the interim action concept to the Draft Proclamation, the action taken will have to be keyed carefully to any action taken by the United Nations. Information obtained in intercepting vessels carrying biological weapons or equipment for their delivery will have to be supplied promptly to the Security Council or the General Assembly. The argument is one to be advanced as the Proclamation is executed and its effectiveness will hinge upon the prudence and moderation with which the policies of the Proclamation are carried out.

The Draft Proclamation requires no revision and the President may be advised to approve it.

¹⁸⁷ Christol and Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962" 57 *A.J.I.L.*, 525, 537-539 (1963).

CHAPTER V

ECONOMIC WARFARE AS A SECONDARY POLICY DEVICE

INTRODUCTION

When economic warfare is waged as a secondary policy device in support of military operations, military requirements dictate the choice of economic warfare forms and techniques. Protracted harassment was emphasized in World Wars I and II because required by the military situation.

The web of naval-administrative control devices characterizing Allied economic warfare in both world wars is described in this book as NAVAD blockade. NAVAD blockade is an extension and refinement of contraband controls and controls over enemy property supplemented by various techniques to prevent land shipments by neutrals to the adversary. Features of NAVAD blockade are considered distributively in the materials in this Chapter.

Naval officers figured prominently in NAVAD blockades, although mainly in the interception and diversion of suspected vessels rather than in contributions to economic warfare policy or to the law governing it. Their opportunities to make or influence basic economic warfare decisions were limited when compared to opportunities provided them when economic warfare is waged as a primary policy device. Their "policy voices" were muted and in some phases of economic warfare, silenced, by belligerent practices to centralize the administration of economic warfare and to control potentially hostile shipments at source.¹

But the economic warfare practices of World Wars I and II may not be repeated in their same form. In general wars involving employment or threat of employment of ultradecisive weapons, the techniques of NAVAD blockade familiar in the two global conflicts may be substantially altered. In these, or in "limited" wars, economic warfare by "economic sortie" rather than by "protracted harassment" may be dominant. The military aspects and requirements of wars differ so radically that general assumptions and certainly precise

¹ See Fitzmaurice, "Some Aspects of Modern Contraband Control and the Law of Prize," 22 *Brit. Y. B. Int. L.*, 73 (1945).

predictions about the form of economic warfare as a secondary policy device tend to be quite idle.

The Discussions in this Chapter are based upon *General Situation 7* and four Special Situations. The economic warfare operations are first conducted unilaterally by the United States (a Naval Blockade, considered in *Special Situation 7A*) and are then extended as the conflict increases in intensity through enforcement action undertaken by the Organization of American States in which the United States participates. Contraband (*Special Situation 7B*); Ultimate Destination and related problems (*Special Situation 7C*); and Maritime Enemy Property Control (*Special Situation 7D*); are considered in this context of multilateral-regional security action. The entire action occurs with a backdrop of pending major conflict involving NATO. This impending conflict requires the United States to husband its naval resources.

General Situation 7 is followed by a summary of major sources of legal doctrine pertinent principally to economic warfare supporting military operations and an introductory analysis of "neutrality." The reader will find it helpful to examine these before considering the Special Situations.

A. SOURCES OF LEGAL DOCTRINE IN ECONOMIC WARFARE AND THE PROBLEM OF NEUTRALITY

General Situation 7

The Zone of Surveillance proclaimed by the President in *Situation 6* was established and the naval action within it executed as directed. Two trawlers, equipped with aerosolizing devices, and having aboard aerosols tentatively identified as containing Melioidosis-B bacteria, have been intercepted and diverted to Key West. Disposition of the vessels, both formerly Scythian trawlers, now of Nuevan registry, is undecided.

During operations in the Zone of Surveillance, a revolt occurs in The Peoples Republic of Carthage, a Scythian ally. Scythia intervenes to suppress this revolt by military force, contending the revolt was organized by the unconventional warfare service of a NATO member. The threats against this member by Scythia are considered so serious that most units of United States STRIKE Command are committed to Europe in support of NATO. Numerous naval units are withdrawn from the Zone of Surveillance and transferred to the United States Sixth Fleet.

Salvaje takes advantage of this reduction of United States strength immediately available for commitment against him to

land troops in Antioka. Assisted by a local revolutionary, Hernando, Salvaje overthrows the Gondomar government. Marshal Gondomar, with his principal officers, are flown to the United States from Coloso. They are recognized by the United States as the Antiokan government-in-exile.

Attacks then occur against United States merchantmen along the Louisiana and Texas coasts by motor torpedo boats. Four tankers are sunk with forty-two crewmen lost.

One motor torpedo boat is destroyed and its crew captured by U.S.S. *Buchanan*. The crewmen are identified as Nuevan naval personnel. They have been ordered to make selective attacks upon United States shipping in reprisal for interception and diversion of the two Nuevan trawlers now held at Key West.

To forestall further attacks from Nueva or Antioka without committing air or ground forces until the degree of support required for NATO is determined, the President determines to place Nueva and Antioka under naval blockade. Congress has approved the President's decision by Joint Resolution. The case of the United States has been placed before the Security Council with a draft resolution for action against Nueva and Antioka under Article 42 of the Charter. The Organ of Consultation of the Organization of American States has before it a proposal for action against Nueva and Antioka under Articles 3 and 8 of the Rio Pact.

Admiral Brown, Commander Second Fleet, issues the following declaration of blockade pursuant to orders of the President:

DECLARATION OF BLOCKADE

At 2400 hours, Greenwich time, 3 June 19--, the coasts and ports of the islands of Antioka and Nueva will be placed by order of the President of the United States under blockade by United States naval forces under my command. Neutral vessels or aircraft seeking ingress will be permitted to pass if carrying cargoes of medical supplies or food only. Such vessels having obtained ingress will be permitted egress if in ballast or without cargo. Vessels, surface or subsurface, or aircraft, seeking ingress will transit waters or superjacent airspace in the area delimited by * * * [description by longitude and latitude] * * * on routes indicated upon the attached chart. [Chart omitted.]

Neutral vessels and aircraft which are in the blockaded region at the time of this Declaration are given a period of grace expiring at 2400 hours, 6 June 19--, in which to depart the area blockaded. This period of grace is granted upon the express condition that neutral vessels and aircraft departing the area blockaded do not violate the law of nations.

All means authorized by international law and by treaties with neutral powers to which the United States is a party will be enforced by the United States against surface or subsurface vessels or aircraft attempting to breach this blockade.

A surface or subsurface vessel approaching the blockaded area will be warned by the commander of the intercepting United States naval vessel. This warning will be indorsed on the register of the vessel.

Aircraft will be instructed by radio to proceed to the nearest appropriate landing area under United States control where an appropriate entry of the warning will be made upon the log of the aircraft.

If such vessel or aircraft again attempts to enter or leave the blockaded area, with the exceptions hitherto noted in this Declaration, the vessel or aircraft will be seized and sent to the nearest convenient port of the United States for such proceedings against the vessel or aircraft and its cargo as may be deemed advisable.

Vessels which cannot be searched conveniently at sea and all aircraft will be diverted for search to ports to be designated by the blockade commander. Subsurface vessels encountered in the blockaded area will be warned to surface by exploding four harmless underwater charges, accompanied by the sonar signal IDKCA. Submarines so warned will surface on an easterly course.

Given on board the U.S.S. Columbia at long. ----, lat. ---- at 0900 2 June 19--.

The Secretary of State has notified diplomatic representatives of the President's order and the Declaration of Blockade. Consuls in Antiokan and Nuevan ports have been similarly notified. Information concerning the Declaration has been broadcast by the Navy at intervals to vessels and aircraft.

Having examined the Declaration, you are now considering the sources of law likely to bear upon the conduct of United States and other naval units and are trying to determine the status to be accorded naval units other than those of Antioka and Nueva. What are the major sources of doctrine? Should vessels other than Antiokan or Nuevan be considered "neutral"?

Discussion: General Situation 7

1. *Sources of Doctrine: Economic Warfare at Sea as Secondary Policy Device*

Many of the legal doctrines, or past community policy expressions, applicable to economic warfare at sea, are derived from custom. This custom developed sporadically—principally in the Napoleonic Wars, the American Civil War and World Wars I and II. Much of the

custom is found described in the decisions of prize courts and in national prize legislation.

Several multilateral international transactions are also sources of legal doctrine applicable to sea economic warfare. The most important of these are the Declaration of Paris, 1856,² and the "un-ratified" Declaration of London, 1909.³ Several conventions formulated at the Hague in 1907 bear in part upon economic warfare at sea.⁴ The 1949 Geneva Convention relating to Civilian Persons in Time of War⁵ and several other of the 1949 Conventions⁶ bear to a limited extent upon maritime economic warfare practices.

² See *Naval War College, International Topics and Discussions, 1905*, 109 for preamble and full text.

³ See *Naval War College, International Law Topics, 1909*, for general report and text.

⁴ IV Convention Respecting the Laws and Customs of War on Land and

⁵ 6 UST 3516, *TIAS* 3365, 75 UNTS 287.

⁶ For texts of The Conventions see *Naval War College, International Law Documents, 1950-51*.

Annex (containing several provisions relevant to blockade, particularly NAVAD blockades) 36 Stat. 2277, TS 539, II Malloy, 2269; V Convention Respecting the Rights and Duties of Neutral Powers and Persons in War on Land (containing provisions relevant to NAVAD blockades) 36 Stat. 2310, TS 540, II Malloy, 2290; VI Status of Enemy Merchant Ships at the Outbreak of Hostilities. (Not signed by United States delegates or ratified. Denounced by Great Britain in 1925.)

VII Convention Relative to the Conversion of Merchant Ships into Warships (not signed by United States delegates or ratified); VIII Convention Relative to the Laying of Automatic Submarine Contact Mines, 36 Stat. 2332, TS 541, II Malloy, 2304; IX Bombardment by Naval Forces, 36 Stat. 2351, TS 542, II Malloy, 2314; X Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of July 6, 1906 (replacing for the United States and most of the other contracting parties a similar Convention of 1899 applying the 1864 Geneva rules), 36 Stat. 2371, TS 543, II Malloy, 2326; XI Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, 36 Stat. 2396, TS 544, II Malloy, 2341; XIII Convention Concerning the Rights and Duties of Neutral Powers in Naval War (ratified by the United States with reservations. Not ratified by Great Britain. Generally regarded as expressing customary rules), 36 Stat. 2415, TS 545, II Malloy, 2352.

III Convention Relative to the Opening of Hostilities, 36 Stat. 2259, TS 538, II Malloy, 2259 is of diminished importance under the aegis of the United Nations and in the light of contemporary power practices. XII Convention Relative to the Creation of an International Prize Court was signed by the United States delegates but not ratified.

No international prize court was established and the modern blockade and other economic warfare techniques render the prospect for such a court remote. All of the Hague Conventions of 1907 may be found conveniently set forth in *Naval War College, International Law Situations, 1908*, 117-248.

Special conventions, such as those applicable to the Suez⁷ and Panama⁸ Canals, deny a belligerent right of blockade of the canals at least as to parties to the conventions. The Pan American Maritime Neutrality Convention,⁹ signed at Havana in 1928, and ratified by the United States with reservations, establishes as between the American signatories a comprehensive neutrality code bearing directly upon blockade practices. Part IV of the London Naval Treaty of 1930¹⁰ states "established rules of International Law" applicable to submarine attacks on merchant shipping. Numerous conventions of limited scope and bilateral treaties indirectly bear upon blockade practices.

The Declaration of Paris of 1856¹¹ stemmed from a *modus vivendi* developed between Britain and France as part of their Crimean War alliance.¹² Four points are set forth in the Declaration. As a concession to the British, privateering was abolished. A neutral flag was stated to protect noncontraband enemy goods, and neutral goods not contraband were stated to be immune from capture although under an enemy flag. Directly applicable to blockades of the nineteenth-century type was the statement: "Blockades, in order to be binding, must be effective, that is to say, maintained by force sufficient really to prevent access to the coast of the enemy.* * *" ¹³

⁷ Convention of Constantinople (1888), Art. I, 15 Martens, NRG 2d Ser. 557. " * * * Le Canal ne sera jamais assujetti à l'exercice du droit de blocus." (Germany, Austria-Hungary, Spain, France, Great Britain, Italy, Netherlands, Russia, and Turkey were parties.)

⁸ Treaty to Facilitate the Construction of a Ship Canal (Hay-Pauncefote Treaty) (1909), Art. III, 32 Stat. 1903, TS 401, I Malloy, 782. The United States adopted the Rules of the Convention of Constantinople in substance as the basis for neutralization of the proposed canal.

Article III(2) states: "The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder."

Stipulations of the Hay-Pauncefote Treaty were applied to the Panama Canal in Convention for the Construction of a Ship Canal (Hay-Bunau Varilla Treaty) (1903), Art. XVIII. For the difficulties arising in the passage of ships in time of war through these international waterways among others, see Baxter, *The Law of International Waterways*, 187-244 (1964).

⁹ 47 Stat. 1989, TS 845, 135 LNTS 187.

¹⁰ 46 Stat. 2858, TS 830, 112 LNTS 65. The text of this treaty will be found in *Naval War College, International Law Situations, 1930*, 139, (Part IV at 159).

¹¹ See Fn. 2, *supra*.

¹² See Malkin, "The Inner History of the Declaration of Paris," 8 *Brit. Y. B. Int. L.*, 1-44 (1927).

¹³ The French rendition of this provision is: "Les blocus, pour être obliga-

The four parts of the Declaration were stated by the declarants to be inseparable. Other states were invited to accede to the Declaration; and all significant maritime states have done so except the United States.

When President Pierce expressed his objections to the British and French proposal in 1854, the United States did not contemplate the creation of a large navy yet cherished a long-standing grievance against both France and England for seizures of private property at sea during warfare. Consequently, President Pierce was prepared to renounce privateering only if all noncontraband private property, including that owned by citizens of belligerents, whether or not under an enemy flag, should be exempt from seizure.¹⁴

With the development of a large navy by the United States and the gradual extension of the scope of contraband lists by belligerents in World Wars I and II, the objections voiced by President Pierce are no longer viable. The United States applies the provisions of the Declaration without accession.

The London Declaration, 1909,¹⁵ unlike the Declaration of Paris, 1856, contained a provision for ratification as well as for adherence by powers not represented by the London Conference.¹⁶ Article 68 of the Declaration provided for effectiveness only upon ratification.

The British House of Lords failed to approve the declaration and Great Britain failed to ratify. Since Great Britain was then the major naval power, and had called the Conference, the other declarants refused to ratify also.

The Declaration was accepted by the belligerents in the Turco-Italian War of 1911 and the Balkan Wars of 1912-13 and was applied by the British and French with certain additions and modifications at the beginning of World War I.¹⁷ After three further modifications,¹⁸ the decision to apply the Declaration directly was

toires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi." The English "prevent" is not, of course, an exact translation from "interdire" and this has produced difficulty in applying this rule of the Declaration.

¹⁴ See *Naval War College, International Law Topics and Discussions, 1905*, 111-112.

¹⁵ See Fn. 3, *supra*.

¹⁶ Germany, United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, Netherlands and Russia were represented at the Conference.

¹⁷ Order-in-Council (Declaration of London No. 1) 20 Aug. 1914, 108 *Brit. and F. St. P. (Pt. II)*, 100 (1914). A convenient statement of this and the four subsequent Orders-in-Council relative to the Declaration of London may be found in Smith, *The Law and Custom of the Sea*, 246-252 (3d Ed., 1959).

¹⁸ Order-in-Council (Declaration of London No. 2) 29 Oct. 1914, 108 *Brit. and*

withdrawn with a decision announced to exercise belligerent rights "in strict accordance with the law of nations."¹⁹

Provisions were inserted in the Order concerning facts to raise a presumption of hostile destination required for condemnation of contraband articles; expressly extending the doctrine of continuous voyage to blockades; clarifying the unneutral service doctrine to be applied to a neutral vessel carrying contraband which proceeds to an enemy port despite the destination shown on her papers; and providing for capture and condemnation of a vessel carrying contraband if—by value, weight, volume or freight—the contraband forms more than half the cargo.

Despite failure of the Declaration of London of 1909 to develop as the basis of a formal legal regime for naval war, the rules represent a consensus concerning blockade, contraband, unneutral service and enemy character among major sea powers in the early twentieth century. Had the House of Lords approved the Declaration and Great Britain ratified, it seems generally agreed that other participants in the London Conference would have followed suit.

Some provisions of the Declaration, particularly those relating to contraband, contained a built-in obsolescence element rendering them useless in World Wars I and II. The theme emphasized in the Declaration, the importance of safeguards for private property at sea, may render the Declaration principles entirely inapposite in any future naval contest with Communist powers or in contests in which the navies of merchant shipping of these countries become significantly involved.

The Hague Conventions of 1907, because of their general participation clause, were not technically in force in World Wars I and II. But prize courts of several countries and international tribunals have pointed out that the Hague provisions may reflect accurately an existing and binding custom.

One cannot assume, of course, that the discovery and application of legal doctrine from either custom or treaty will provide a certain standard by which contemporary community characterizations of economic warfare at sea will be guided. One obvious difficulty is presented by the breakthroughs in physical sciences leading to improvements in naval hardware.

F. St. P. (Pt. II), 156; Order-in-Council (Declaration of London No. 3) 20 Oct. 1951 (Abrogating Art. 57 of Declaration of London which states that neutrality of a vessel is determined by flag she is entitled to fly) 109 *Brit. and F. St. P.*, 344 (1915); Order-in-Council (Declaration of London No. 4) 30 March 1916, 110 *Brit. and F. St. P.*, 173 (1916).

¹⁹ Order-in-Council (Declaration of London No. 5—Maritime Rights Order) 7 July 1916, 110 *Brit. and F. St. P.*, 236 (1916).

Some important developments since the Declaration of London are in subsurface vessels and aircraft and in electronic scanning devices and nuclear power. These improvements are conducive both to the effective establishment and breaking of blockades and to the efficient carriage and efficient interception of contraband. Controls by governments over their internal economies have vastly expanded. State trading and interlocking private business arrangements present special problems in determining enemy character.

These and other difficulties will be considered distributively in discussions of the various Special Situations. However, embedded in all doctrinal sources from which viable policy standards might be developed is an analysis of belligerent "rights" in terms of "neutral rights and obligations."

The concept of neutrality has at all times been shifting and elusive. This might be expected when one attempts to deal with a physiological process of withdrawal from conflict by applying legal norms developed to regulate participation.²⁰ Yet it is important to understand how neutrality is used in economic warfare at sea. Thus the subject of neutrality will now be examined prior to a detailed treatment of specific economic warfare problems.

2. *Neutrality and Economic Warfare at Sea*

Several preliminary and provisional generalizations may be based upon the troubled history of neutrality in sea warfare.

(a) "Neutrality," while used to describe a complex of claims stemming from military conflict, typically characterizes a *limited* withdrawal from conflict by an avowed nonparticipant. Seldom is the withdrawal complete. Some contact is maintained by the non-participants (neutral) with one or more of the participants (belligerents).

(b) Nonparticipants (neutrals) tend to assert a legal *status quo*.

²⁰ The general thrust of legal development has been the creation of legal institutions to maintain a dynamic balance in the flow of values within a community. To maintain this balance, most legal techniques have been directed to moderating the pace of change within the community by orderly methods for resolving conflict and controls over the results of conflicts.

In primitive communities, there is little concern with the withdrawer from conflict—he takes his chances without the protection of kindred or tribe. In more highly organized communities, all withdrawal phases become of increased importance—being enforced (as in imprisonment or exile) stabilized (as in quarantine for disease) or prevented (as in penalties for desertion from the military services or sleeping on guard duty). It has proved much simpler to deal with the basic problems which legal institutions were first developed to solve—cases of physical injury or business disagreement—than to use these institutions to maintain or break the cords of community contact.

The tendency is to rely almost exclusively upon past expressions of legal doctrine for guidance. The strategic position of the neutral (in a legal sense) essentially is defensive. The initiative and factual perspective of the nonparticipant tend to be sharply limited.

(c) Participants tend to hold the legal initiative in dealing with conflict withdrawals. Participants, however, labor under the disadvantage of ambivalence in applying legal institutions. To accomplish their economic warfare objectives, participants incline towards an aggressive formulation of novel neutrality doctrines. At the same time, participants seek stability in much neutrality doctrine with a view to their future nonparticipation in conflict.

The neutrality policy of the United States has changed directions in the past like a weather vane in an uneasy wind. As a participant in conflict, the United States has been a leader in formulating new restrictions upon neutrals. As a nonparticipant the United States insists with equal vehemence upon the vitality of neutrality doctrine of the past.

Operation of the factors briefly outlined in (a) through (c) has invited chaos in international law concerning withdrawals from conflict. Part of this impending chaos stems from basic limitations upon the use of legal institutions for policy guidance. The chronic obsolescence of legal doctrine has been mentioned repeatedly in earlier discussions in this book. Obsolescence is accentuated in withdrawal problems by the strikingly sporadic formulation of neutrality law.

From the perspective of the participant, three immediate objects tend to be involved in applications of neutrality law. The withdrawal must be (1) forced; (2) stabilized; or (3) prevented.

In past naval warfare at sea emphasis has rested upon forcing complete withdrawals through the interception of commerce of nonparticipants and by other pressures. Emphasis may well rest in the future upon stabilizing or preventing withdrawals. In nuclear warfare, for example, nonparticipants may be carefully cultivated by the participants in a manner which will expand the participation of a neutral state rather than the contrary.

Each claim to nonparticipation or limited participation in conflict, whether or not couched in neutrality terms, tends to be *sui generis*. A premium for each decision maker lies in the development of a maximum span of multidimensional factual perspective relevant to opposed participation and nonparticipation claims in each confrontation.

Basic to an analysis of claims to participation and nonparticipation in armed conflict is discrimination between the pattern of factual interaction, the claims asserted by the participants and nonpar-

ticipants and the flow of authoritative decisions which bear upon these claims. This discrimination is especially useful when dealing with economic warfare used as a secondary policy device. In these cases, facts relevant to opposed economic claims are often obscured by glaring military requirements.

*Pattern of Interaction Between Participants And Nonparticipants:
General Conditions for Action*

The pattern of interaction among participants and nonparticipants in the economic sphere reveals much stability in practice since World War I. There is a prospect of future major evolution in practice due to the rapidly changing general conditions by which all international processes for coercion are affected. These general conditions furnish a background for all decisions in current conflict contexts and thus will be considered briefly.

The current power environment is characterized by rapid erosion of the post-World War II bipolar power structure. The pattern is one of withdrawal from the shelter afforded by the superpowers—the United States and the Soviet Union. Such a withdrawal is permitted by the military stalemate produced by a temporary balance in nuclear armament.

This process is demonstrated by the growing spirit of independence among Soviet satellites, the breakdown of European colonial structures, and frequent challenges to the influence of the United States in Latin America. Pronounced strains have been experienced in NATO. “Neutralist” countries seek competing economic assistance from the United States and the Soviet Union. Red China has made a bid for leadership within the Communist and uncommitted worlds. There is no likelihood that this trend of withdrawal from the central arena of struggle between the United States and the Soviet Union will be reversed.

These withdrawals from the central arena of conflict have not been accompanied by withdrawals from conflict generally. To the contrary, the withdrawing nations have exhibited a belligerent spirit. In any future major war, these aggressive postures may be expected to offset a trend towards withdrawal from military violence. Extensive economic contacts may be claimed with belligerents. Many of the states in the process of withdrawal currently are nonviable economically. The continued economic contact with sources of materials and technology will be critical. The probability is that these nations will appear as active proponents of neutral rights while being peculiarly susceptible to economic coercion.

Contraposed to this general pattern of withdrawal is the orga-

nization in the United Nations of a world community structure. This structure rejects as a premise the prerogative right of a sovereign state to engage in warfare and postulates a viable administrative structure by which recourse to force will be held at a minimum and persuasive practices in interstate relations encouraged. A principle of minimum order is established which members of the organization and less comprehensive organizations are committed to support.

When, by the processes for authoritative decision within comprehensive organizations of this nature, a state is deemed to resort to coercion "illegally," member states no longer are entitled to treat participants in the conflict impartially. They must discriminate and award differential treatment to the combatants.

A possible escape for the withdrawer lies in incompleteness of the pattern of commitments. The involvement of nonmembers in armed conflict is a typical example. The commitment may be argued as inoperative in a case in which both the Security Council and the General Assembly fail to act to preserve peace.

These routes for evasion, coupled with the trend toward withdrawal or noncommitment, have contributed to expectations that differences between states will be solved by violence and intervention by comprehensive security organizations will prove ineffective. A condition tending to weaken these expectations is the preparedness of the United States, and other states with an interest in international order, to act to preserve peace until comprehensive security organizations can shoulder this burden.

The expectation that interstate differences will be solved by violent methods nevertheless remains pervasive. The tendency in a power context is to think in terms of balance, with the chance of effective withdrawal by a nonparticipant in conflict, armed or otherwise, depending upon the common interest of major powers to prevent interferences with or incorporation of the smaller withdrawing members of the community. As stated by McDougal and Feliciano:²¹

* * * /T/he probabilities of noninvolvement in a given conflict appear to be a function of, among other factors, the general configuration of the arena and of the maintenance of a relative equilibrium of power between the belligerents *inter se*, as well as between the belligerents and nonparticipants.

The expectation as to effectiveness of a balance of power to safeguard the withdrawer is a pessimistic one. The range of raw ma-

²¹ McDougal and Feliciano, *Law and Minimum World Public Order*, 392 (1961). The analysis of neutrality here suggested follows substantially the outline propounded by these authors.

materials necessary to sustain a contemporary military effort upon a broad scale may induce a participant in military conflict to subject a withdrawing state to its direct governmental control.

The destruction of industry by nuclear weapons may attenuate wars to such a degree that participants will have no opportunity to press their claims to control raw material sources upon nonparticipants. It is equally possible that the trend under such circumstances will be toward "open" or "effectively neutral" states sustained by the common interest of participants. This common interest may be founded either upon the preservation of neutrals as havens or places of refuge for civilian populations or upon the use of the neutral as a figure in nuclear strategy. These developments are conjectural. However, the use of nuclear armaments in warfare promises profound shifts in neutrality doctrine.

Conflict Situations

Turning from the conditions to which any current naval decision made during conflict will be subject and concentrating upon particular conflict situations, it is desirable to identify carefully both participants and affected nonparticipants in the conflict and to appraise their policy processes. The participants should be identified, both on a formal and on an effective level.

In *General Situation 7*, the United States, Nueva and Antioka are participants. Neither the United Nations nor the Organization of American States are yet participants in the sense either has characterized the action of Nueva or the action of the United States as "permissible" or "impermissible." Scythia is a nonparticipant, but can shift quickly in either direction.

In some cases, participants or nonparticipants on an informal level will be involved. Merchants, for example, had much influence upon British policy as a nonparticipant during the American Civil War; and similar influence has been exerted by American merchants upon United States policies in our periodic phases of neutrality.

Participants and nonparticipants are characterized by the comprehensiveness of their organizations and the locations of decision makers involved in the particular confrontation within the policy structures of their organizations. Concomitant consideration of these features is useful in predicting the primacy of objectives which will be sought in the contest and the latitude for concession which the immediate decision makers will enjoy.

With an international security organization as a participant, such as the United Nations, the primary objective will be reestablishing order with minimum destruction of values. Decision makers of such an organization, concerned with the blockade and the under-

lying conflict between the United States, Nueva and Scythia, usually will have an extensive latitude for concession.

The bases of power of the participants and nonparticipants should be assessed on the basis of: (1) diversity; (2) dispersion; and (3) magnitude. Upon what values does a participant base its power? The usual territorially based community, excluding minor principalities, will enjoy a multivalued power base. These values may be concentrated or dispersed. Stockpiling practices of the United States, pursued intensively after World War II, have placed the United States in a secure resource position. This secure position may be relied upon defensively to support a claim of neutrality if the United States chooses nonparticipation in a conflict between major powers. The position may be relied upon offensively when economic warfare is used as a primary policy device. It may also be used as a bargaining element when the United States is a participant, uses economic warfare as a secondary policy device, and deals with a nonparticipating state possessing a strategic resource.

The failure by a participant to develop such a resource base for the production of values in sufficient diversity and magnitude will limit its warmaking potential. The failure also will bear significantly upon its relations with nonparticipants which possess an adequate resource base. Nazi Germany, for example, failed to stockpile strategic materials for a war of the duration which World War II proved to be.²² During the Russian campaign, an invasion of Sweden, a nonparticipant, might have been to the military advantage of Germany but could not be considered seriously because of the dependence of Germany upon Swedish iron, steel and precision parts, resources which might have been lost in an invasion by application of a Swedish "scorched earth" policy.

Writers have emphasized relative magnitudes of power in determining lines of compromise between participants and nonparticipants in conflict.²³ The diversity and dispersion of bases of power are also

²² General Thomas, director of the *Rüstungs-und Wirtschaftsamt*, OKW, defined Hitler's instructions for war mobilization as a choice of armament in width instead of armament in depth. Apart from the miscalculation of a short war, German accumulation of stockpiles of critical materials was hampered by a shortage of foreign exchange.

²³ E.g., McDougal and Feliciano, *Law and Minimum World Public Order*, 388 (1961); Orvik, *The Decline of Neutrality 1914-1941*, 13 (1953). Other writers place emphasis upon "sanctions" supporting neutrality, describing the institutional structure by which neutral claims are asserted, and appear to place value upon the routine functioning of these institutions as sanctions supporting neutral positions. Professor Stone, for example, while apparently considering the relative power of participants and nonparticipants highly significant refers

significant. These, coupled with the determination of the competing parties, are of the greatest relevance in establishing their bargaining power and the outcome of a neutrality contest as well as the types of neutral claims asserted.

The objectives of participants and nonparticipants can be anticipated by an appraisal of the comprehensiveness of their organization. In addition their objectives can be characterized in terms of exclusiveness or inclusiveness. The objectives of the withdrawer (nonparticipant or neutral) tend to be exclusive in the sense that the values sought to be protected are not to be widely shared. The objectives of the participant tend towards inclusiveness, not for philanthropic reasons, but simply because the participant tends to seek allies and thus projects its policies as those in which values are intended to be shared—at least by the potential allies whose favor is courted.

The objectives of both participants and nonparticipants in a situation of intense conflict tend towards exclusiveness when compared to the objectives of the United States when taking action in a low intensity conflict such as that described in *General Situation* 7. The objectives of a state taking interim sustaining action to preserve the peace, pending action by the United Nations or a regional security organization, and thus tending to support the general security and well-being of states other than those against which the action is taken, have dominantly “inclusive” characteristics. The inclusiveness or exclusiveness of the objectives sought by participants and nonparticipants will bear importantly upon the persuasiveness of their arguments to support belligerent and neutral claims to rights and obligations.

While in part a matter to be considered as part of the general conditions under which conflict currently occurs, but useful to consider as an element of a special conflict situation, the orientation of the participant or nonparticipant concerning government ownership or control of trading activities is an important feature in an analysis of objectives. The overall volume of trade now handled by private entrepreneurs in sea commerce has been drastically reduced. States tend towards public ownership of trading facilities. Democratic states are asserting extensive administrative controls over shipping policy, maritime construction, labor conditions and over the volume and character of imports and exports. To the extent that

to the past strength of neutrality law with its comparatively “even and steady pace” of development and the routine administration of justice in prize courts as supporting neutrality. See Stone, *Legal Controls of International Conflict*, 363-366 (1954). See also, Fox, *The Power of Small States* (1959), *passim*.

a nonparticipant owns its shipping facilities or asserts controls which are tantamount to ownership, to this extent the traditional legal dichotomy between state and private trading in a neutrality context is eroded.

Moving from an orientation in terms of participant and nonparticipant characteristics to an analysis of the nature of the conflict between participants and the degree of involvement of "nonparticipants," three features should be considered: (1) The dimensions of the conflict—both institutionally and geographically; (2) Intensities—including strategies and techniques employed by participants and nonparticipants; and (3) Specific claims to participation and nonparticipation asserted. These features are interrelated. The tendency, for example, is for a current contest between states evenly matched in an intermediate power range to become complex institutionally or "vertically." Each state seeks assistance and allies. The threat of acceleration of violence is such that international security organizations, developed to prevent or confine extensions of violence, are involved immediately. The recurrent contests between Israel and its Arab neighbors are excellent examples.

Powerful nonparticipants furnish assistance to their favorites in the struggle with their degree of participation conditioned or at least complicated by their commitments to the international security organizations which also are involved. Claims of neutral rights by these nonparticipants, which they can support by force, are nevertheless curtailed by their obligations to international organizations which seek to confine the conflict and resolve it.

The contest between the United States, Nueva and Antioka, while between participants unevenly matched and currently confined geographically, is subject to geographical extension by fusion with the concomitant contest between Scythia and NATO. Without this extension geographically, the contest promises to become complex only institutionally—by participation of the United Nations, the Organization of American States and perhaps other international organizations.

Conditioned claims of neutrality may be asserted if this institutional complexity develops with neutrality claims of a "traditional" nature asserted if institutional complexity does not develop. If the conflict is extended geographically to one of general dimensions, an unlikely event if the United States and Scythia are both armed with ultradecisive weapons, the institutional (vertical) dimension will recede in importance but traditional neutrality claims will be curtailed both in assertion and in respect by the overwhelming power of the participants.

The neutrality claim is thus likely to have its maximum effective scope when the conflict is limited geographically; but the claim in this situation will tend to be conditioned by the institutional complexity or institutional (vertical) dimensions of the conflict.

The intensity of the conflict will also have a bearing upon the claims asserted by nonparticipants which are recognized by participants. In high intensity conflict, strategies involving the use of ultradecisive weapons, such as nuclear, chemical and biological weapons systems, as well as ideological and economic warfare, will figure prominently.

Not only will the character of neutrality be greatly modified by the socialization of risk in the potentialities of ultradecisive weapons and the general effects resulting from their use, but supporting ideological and economic warfare will be directed to a major extent against nonparticipants with a view to indirect effects upon the opposing belligerents. In conflicts of less than maximum intensity, such as the conflict in *General Situation 7* in which economic warfare is being employed to maintain an area *status quo* to support a military commitment to NATO, claims of nonparticipants are likely to be extensive and their recognition by participants probable.

Claims to Participation and Nonparticipation

What claims have been asserted to participation and nonparticipation in past conflicts and what has been the structure and process of decision making with respect to them? What claims to participation and nonparticipation are asserted in current *General Situation 7* and what will the structure and process of decision making with respect to these likely be? The pattern of claim and counterclaim to participation and nonparticipation in past conflicts may be described briefly in three categories.

(1) First are claims to participation or nonparticipation based upon self-preservation or self-defense. These claims and the structure and process of decision making with respect to them have been discussed in Chapter IV, *Situation 6*, in the context of economic warfare as a primary policy device. These claims also have a bearing upon belligerency-neutrality contentions in military conflict when economic warfare is used as a secondary policy device. The claims, however, will probably be asserted by participants and nonparticipants with maximum force in conflict in which ultradecisive weapons with generalized physical effects are employed; and in such a conflict the maintenance of a community structure for authoritative decisions bearing upon such opposed contentions will be difficult. The problem thus assumes the shape of one not amenable to the

influence of legal norms and is not discussed in further detail here.

(2) Second are claims by an original or nominal nonparticipant either to intervene or withdraw from military conflict between other states. The claim of intervention is based upon an authorization or requirement, the latter imposed by a collective security arrangement, to maintain the peace. The measures undertaken might range from "policing" military measures to various forms of ideological or economic assistance to a state characterized by the intervenor or a collective security arrangement as the victim of an aggressor. The action might be volitional or nonvolitional. An offended belligerent will counterclaim that the intervenor, because not a subject of attack, has a duty of abstention or impartial treatment. The opposed contentions normally will be discussed in the context of the commitments of the intervening "nonparticipant" as a member of a collective security arrangement.

The same context will be relevant if the nonparticipant insists upon withdrawal from the conflict rather than upon intervention. An offended victim of aggression will insist upon the obligations of the withdrawer based upon its treaty commitments or upon a characterization of illegality by organs of the United Nations or a regional security organization.

(3) Third are claims made in a context of "permissible nonparticipation" (that is, when participation is not required by a collective security arrangement) concerning specific belligerent-neutral (participant-nonparticipant) relationships. The most important group of specific claims in this category for the development of a decision in *General Situation 7* are claims by a belligerent to interdict economic intercourse between a nonparticipant and the opposing belligerent. Of less immediate relevance to a consideration of problems of economic warfare at sea are participant claims against nonparticipants to abstain from direct military aid to opposing belligerents; and claims by nonparticipants against participants to abstain from direct military intervention in the territory of the nonparticipant.

Community decisions concerning claims in these three categories may be rendered at levels of authority ranging from representatives and officials of international organizations functioning during the conflict to prize courts and administrative officials at ports of diversion of the belligerents.²⁴ Decisions may also be rendered by

²⁴ A convenient description of prize courts and their jurisdiction may be found in Colombos, *The Law of Prize* (2d Ed., 1940). To administrative officials at ports to which vessels might be diverted, can be added the host of navicerting officials and economic warfare officials functioning during modern military

international courts and claims commissions when the conflict has terminated.²⁵

The objectives of international organizations as participants in conflict have been considered heretofore in this analysis. National prize courts and administrative officials of a belligerent predictably will share the objectives of the belligerent. Prize courts, however, tend to build up a body of prize doctrine conforming quite closely to norms established by world community decisions. While belligerents can and have changed their national prize law by legislation to accomplish wartime objectives, these changes are made infrequently and tend to encounter judicial resistance.

With respect to the two general categories of claims principally relevant to economic warfare at sea: (1) The claim by an original nonparticipant either to intervene in conflict to preserve order or withdraw from it; and (2) Claims in a context of "permissible nonparticipation" concerning specific participant-nonparticipant (belligerent-neutral) relationships; basic policies of community decision makers have been established by agreement—by multi-lateral conventions.

Policies concerning claims of the first category currently are expressed in the United Nations Charter and constitutive and other instruments of regional security organizations or arrangements established under Charter provisions. These agreements express generally the revived policy of minimum order.

Agreements concerning claims in the second category, such as the Declaration of Paris, 1856, the London Declaration, 1909 (unratified), relevant Hague Conventions of 1907 and the Pan American Neutrality Convention of 1928, heretofore described, basically are codifications of custom developed over several centuries. These older conventions do express a policy for minimum value destruction. Such values include the well-being and respect of the individual as well as his wealth.

The policy of minimum value destruction remains viable. But detailed prescriptions in the older conventions must be reconciled in community decisions with the minimum order policy expressed in the later United Nations Charter and related agreements.

contests, all of which can be expected to reflect belligerent demands and seek belligerent objectives if these are maintained in spite of conflicting community decisions.

²⁵ The postconflict claims decisions, by and large, tend to involve rough and ready compromises in which the principles of decision remain obscure. To a degree the Alabama Arbitration shared this defect, although the Commission induced the parties to agree to the Treaty of Washington establishing three rules for determination of the various cases. A full account of the Alabama proceedings may be found in I Moore, *History and Digest of the Arbitrations to which the United States has been a Party*, 496-665 (1898).

The community methods for characterizing particular resorts to coercion as permissible or impermissible in the light of these principles, and the community methods for identifying a transgressor, have tended, during the twentieth century, to become centralized in formal decision-making structures. The formal pattern of state commitments to support of these decisions has become more comprehensive. But commitment practices have been eroded effectively by systemic conflict since the end of World War II and the pattern of withdrawals from this conflict previously described.

The Covenant of the League was the first significant formal departure from the traditional international legal position that a state had a sovereign right to resort to war. It was thus also the first significant assault upon the traditional doctrine of neutrality.

The Covenant, conservatively, stated four cases in which resorts to war were impermissible.²⁶ These prohibitions were not, however, supported by a decision-making structure which definitely could: (1) characterize a breach; (2) label a wrongdoer; or (3) direct consequent action by members.

The authority of the League Council was limited to recommendations to its members; and an undertaking in the Covenant for economic action and severance of communications with a transgressor²⁷ was construed to be operative only if the member whose response was solicited determined that the transgressor had breached the Covenant. In a practical sense, this left the imposition of economic sanctions to the volition of individual members, many of whom failed to act in patently appropriate cases. By the outbreak of World War II most of the League members viewed economic sanctions as nonobligatory.

In this decentralized system for developing the relevant decisions,

²⁶ The four prohibited cases were: (1) No resort to war without submission of dispute to arbitration, judicial settlement of inquiry by council (Art. 12); (2) No resort to war within three months after award, decision or report by arbitral tribunal, court or council (Art. 12); No resort to war against member complying with award, decision or report (Art. 13(4), Art. 15(6)—if report of council unanimously agreed to by other than parties to dispute); (4) Non-member cannot resort to war against member without meeting certain conditions of inquiry by council (Art. 17).

²⁷ Art. 16(1): "Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not."

nonparticipations were endemic;²⁸ and, in the festering chaos which immediately preceded World War II, claims to avoid participation in the impending debacle were "asserted with a vigor begotten of desperation."²⁹ This hopeless flight from an engulfing conflict was not stemmed by the Pact of Paris of 1928 (Kellogg-Briand Pact) in which war was renounced by the signatories as an instrument of national policy.

The Kellogg-Briand Pact did provide a basis for permissive participation by a signatory in maintaining order, whether a Member of the League or not. It also provided a ground for discrimination by a military nonparticipant against a violator of the Pact in a manner which would conflict with the traditional neutral duties as formulated in custom and as embraced in earlier conventions. The early World War II exchange of destroyers for bases by the United States and the Lend-Lease Act of 1941, both before the formal entry of the United States into the War, could be reconciled with the neutral "obligations" of the United States by a "right" to discriminate against Nazi Germany as a violator of the Kellogg-Briand Pact.

In the United Nations system for collective security, the weaknesses of the League were partially repaired by centralizing in the Organization power to characterize as impermissible exercises of coercion in a broader spectrum than the limited "resorts to war" mentioned in the Covenant. The Security Council could identify the transgressor. In addition to recommending action to settle a dispute, or to maintain or restore international peace or security, the Council could decide what measures not involving the use of armed force should be employed and call upon the members to apply them.³⁰ It could also act by the use of armed force.³¹

²⁸ Declarations of neutrality were made by nonparticipants in the Turkish-Greek War of 1921 and in The Chaco War. Upon the outbreak of hostilities in 1939 there were numerous declarations. Furthermore, the Pan American Neutrality Convention of 1928 was ratified by some League Members and the Nine Power Treaty of 1922, signed by nine League Members, contained provisions respecting the neutrality of China in time of war to which she was not a party. There were also a number of bilateral treaties concerning neutrality.

²⁹ McDougal and Feliciano, *Law and Minimum World Public Order*, 423 (1961).

³⁰ Article 41: "The Security Council may decide that measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

³¹ Article 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may tions, blockade, and other operations by air, sea or land forces of Members of

By Article 25 the members agreed to accept and carry out the decisions of the Security Council in accordance with the Charter; and in Article 2(5) to give the United Nations every assistance in any action it takes in accordance with the Charter and refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

A significant gap in the pattern of commitments to support Council action was the keying in Article 43 of the obligation to furnish armed forces, assistance and facilities to special agreements between the Security Council and members or groups of members. These agreements have not been made and the provision of the forces contemplated in Article 42 hinge upon the recommendation of the Security Council and the goodwill of the members.

There was, however, a block to any Security Council action, whether recommendatory or not, in the veto. While the issues might then be discussed by the General Assembly or its Interim Committee under the Uniting for Peace Resolution, a decision rendered would be recommendatory and impose no obligation to act upon the Members. However, consideration of the issues by the General Assembly would permit characterizing the coercion as "permissible" or "impermissible" with identification of any transgressor.

Although the level of commitment as a result of the veto was only slightly higher than under the League, the traditional neutrality pattern was substantially changed by other features. These were centralization of the characterization process; an obligation under Article 2(5) to abstain from aid to any state against which the United Nations was taking preventive or enforcement action; and commitment under regional security arrangements or agencies contemplated under Article 52.

In the Rio Pact (Inter-American Treaty of Reciprocal Assistance) of 1947, the Organ of Consultation can agree upon and direct ruptures of diplomatic relations and interruptions of economic relations, transit and communications with a transgressor. It can only recommend uses of armed force.³² The Organ of Consultation takes its decisions by a vote of two thirds of the member states.³³

Under the United Nations aegis, if coercion is characterized as "impermissible" by the Security Council or the General Assembly, and a transgressor is identified, the maximum degree of "permissible

restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations."

³² 62 Stat. 1699 (1947). Arts. 8, 20.

³³ *Ibid.*, Art. 17.

nonparticipation" is enjoyed only by nonmembers. A nonmember might nevertheless be committed to participate pursuant to a regional security arrangement.

Members of the United Nations are bound to no participation simply upon recommendation of the Security Council or General Assembly. "Permissible" participation is possible. If action is directed by the Security Council, for example under Article 41, members are committed to comply.

When coercion is *not* characterized as impermissible by appropriate organs of the United Nations or regional security arrangements, community decisions concerning specific participant-nonparticipant relationships will be formulated in the traditional manner. The degree of "permissible" participation under these circumstances is limited. A "nonparticipant" may accord differential treatment to participants based upon conventions such as the Kellogg-Briand Pact. Self-defense or interim sustaining action are viable bases for limited participation.³⁴

McDougal and Feliciano recommend states under these circumstances should characterize "impermissible" coercions and discriminate among participants in appropriate gradations by decisions of a provisional nature.³⁵ If goals are shared by the characterizing states, diverging characterizations with resulting chaos might be avoided. There is a common interest in preserving minimum order which might militate against these divergences.

In *General Situation 7*, no characterizations of the coercive exchanges have been made by community institutions. This may soon occur. May Scythia, under these circumstances, characterize the conflict and discriminate against the United States?

Nonparticipation seems the proper course unless a different posture can be taken by treaty or on defensive grounds.³⁶ Although the United States has not declared war against Nueva and Antioka, blockade is a belligerent act: in this case responding coercion—defensive in nature. Correspondingly the United States must treat Scythia as a nonparticipant or as a "neutral" until its policy of participation or nonparticipation is expressed.

It is unlikely, however, that Scythian withdrawal from this conflict will be complete until the coercive exchanges are characterized.

³⁴ See Chapter IV (B) (*Situation 6*).

³⁵ McDougal and Feliciano, *Law and Minimum World Public Order*, 414–418 (1961).

³⁶ Judge Jessup and Dr. Bowett, for example, recommend nonparticipation absent a community characterization of the coercion. Jessup, *A Modern Law of Nations*, 205 (1948); Bowett, *Self-Defense in International Law*, 180 (1958).

The most apt description of its position in such a case, assuming no military involvement, is that of "military nonparticipant."

The Security Council or the General Assembly (or its Interim Committee) may or may not characterize the initiating coercion by Nueva and the responding coercion by the United States as "permissible" or "impermissible." Whether or not a characterization will occur can usually be ascertained within about forty-eight hours after the appropriate organ is notified.

If no characterization occurs, the Security Council or the General Assembly will probably attempt peaceful settlement of the dispute. Members of the United Nations are committed to support these efforts towards a peaceful solution.

During the initial forty-eight hours, or longer or shorter time period, while the policy of the appropriate organ is in doubt, the actions of members may range from active military intervention, perhaps on a theory of self-defense or "interim sustaining action" to preserve the peace, to military nonparticipation with economic contact only with participants, to substantially complete withdrawal both in a military and economic sense.

Discrimination against participants may be anticipated until community policy is clarified. When community policy is clarified, discrimination may be anticipated against the identified transgressor. In the unlikely event the community policy is one of detachment and noninvolvement, pressures by participants will tend to reinforce the traditional neutrality norms of nondiscrimination by nonparticipants.

B. NAVAL BLOCKADE

Special Situation 7 A

You are Captain of U.S.S. *Buchanan*, a destroyer, now on blockade. You have received a copy of the Declaration of Blockade stated in *General Situation 7* with supplementary operational instructions. You have reviewed the Instructions to United States Naval Forces Employed in Blockade Operations.

A Scythian merchantman, *Electra*, is approaching your position. The vessel is not proceeding on the course on the chart attached to the Declaration of Blockade. You have radio contact with the master of *Electra*. He states he is bound for *Rivadavia*, Nueva; that his cargo is none of your business; that he knows of no blockade; that *Electra* is a public vessel of Scythia, and an attempt by you to seize her will be an act of war.

Anticipating difficulty with the master when you halt *Electra* for a visit and search or diversion, you are reviewing the principles of naval blockade before you issue final instructions to your boarding officer. What are the principles of naval blockade and how will these principles bear upon your handling of *Electra* and her master?

Discussion: Special Situation 7 A

The blockade declared by Admiral Brown will be conducted as a blockade in depth. The blockade may be described today as a "Naval Blockade"—but should *not* be understood as a "close" blockade of the 19th-century type.

The Federal blockade of the port of Wilmington, North Carolina, is a good example of a 19th-century "close" blockade. The entrance to the Cape Fear River, the sea approach to Wilmington, is divided by Smith's Island into two channels—Smith's Inlet and New Inlet.

Because of poor communications and the distance between the channels, the inner Federal blockading force was divided into two squadrons—one squadron being stationed at each entrance. Each squadron operated independently.

During daylight the ships were at anchor at close intervals. The squadron at New Inlet was anchored just beyond the range of the Confederate guns at Fort Fisher. During darkness, the blockaders raised anchor and patrolled, using pyrotechnics to maintain contact with the anchored flagship.

Beyond the inner force was a second division of cruisers. These usually were under way. Beyond these was a third cordon of blockaders stationed at a variable distance. This distance was estimated by the travel time of a blockade runner crossing the Wilmington bar at high water at night. In theory, the blockade runner, if sufficiently fortunate to escape the first two forces during egress at night, was supposed to be snapped up by the third cordon at daybreak.

While this scheme appeared better designed to capture cotton leaving Wilmington than guns and ammunition going in, it seems at first glance sufficiently tight to deter the most ambitious blockade runner.

However, more tonnage entered and departed the Cape Fear River during the war years preceding the fall of Fort Fisher than in double the equivalent time before or since. So refined had techniques become for running "close" blockades that a British naval maxim declared the best blockader an ex-blockade runner. Hobart Pasha,

a British naval officer on half pay, who ran the Wilmington blockade with regularity, conducted a highly effective blockade for the Sultan of Turkey against the Greeks after the Civil War.

Blockade runners of shallow draft had an advantage of freedom of maneuver against a "close" blockade. Slipping in to a point on the coast, north or south of Wilmington, the runner could skirt the breakers until she reached the protection of the Confederate coast artillery. These guns, upon signal, kept the blockaders at bay until the runner could work her way into the Cape Fear River.

During egress at night, the runner departed before high water, avoided the inner force by passing so close to the flagship that patrols could not fire effectively even if the runner was discovered, and by daylight was beyond the third division on her way to Bermuda or Nassau.

Experiencing similar frustration at most of the major blockaded ports, the Federals came to rely to a great extent upon supplementary long-distance interceptions. These were founded upon the doctrine of contraband and upon the doctrine of continuous voyage.

The effectiveness of these more distant operations was demonstrated by the significant constriction of Confederate commerce evident from 1863 until the end of the war. In 1863, operations of this extended type were the minimum factually effective blockading efforts. The "close" blockades practiced at Wilmington and other Confederate ports, regarded as "effective" legally by many international lawyers, were of doubtful efficiency in snaring blockade runners powered by steam.

"Close" blockades of the 19th-century type were designed to interdict sailing vessels—and sailing vessels often fell prey to the blockaders of Confederate ports. Such a "close" blockade might be useful again in areas in which sailing vessels or vessels of low power are used extensively in trade.³⁷ Had the Federal blockaders at Wilmington been provided with efficient searchlights, other than the crude calcium lights used experimentally at the time, the number of successful runnings of the blockade by fast steam vessels would have been much reduced.³⁸ The use of radio and radar, had these devices been available, would have made the Wilmington blockade "ship tight."

Developments in long-range coast artillery; ballistic and guided

³⁷ See Cagle and Manson, *The Sea War in Korea*, 337–343 (1957) where the use of armed whaleboats vectored through mined areas during darkness to cut out small enemy craft is described.

³⁸ See Schley, *Forty-Five Years Under the Flag*, 247–250 (1904) for the "practice" blockade off Charleston in 1897 using modern searchlights.

missiles; efficient mines and mining techniques; carrier and shore-based aircraft; and submarines; are often cited as precluding "close" blockades. This depends, of course, upon availability of these weapons to the adversary's forces in the blockaded area; and, if the weapons are available, whether they have the skill and inclination to use them.

The Spanish coast defense artillery at Santiago in 1898 was comparable to the coast artillery used extensively in the United States until World War II. But the Spanish gunners were no marksmen; and United States naval units maintained a closer blockade of Santiago in 1898 than of any of the Confederate ports during the American Civil War.³⁹

During World War I, eleven blockades were maintained by naval action alone. A Soviet blockade of Finland was apparently maintained primarily by naval action although it is not clear this blockade was maintained effectively.⁴⁰ The blockade of the East and West coasts of North Korea had analogies to older "close" blockades,⁴¹ as have arms control and counterinsurgency measures taken in waters adjacent to South and North Vietnam.

Many of the devices thought to preclude "close" blockades are themselves aids in maintaining an effective blockade. This certainly is true of mines, submarines and aircraft. Developments in communications and electronic scanning devices probably contribute more to effective techniques for maintaining blockades than to techniques for breaking them.

There are no doubt ports in weak states which can be blockaded efficiently today by vessels anchored at the entrance in the 19th-century tradition. It is equally certain this is seldom a prudent use of naval resources. Administrative trade controls, such as those available to the United States on a current or standby basis, can be used to interdict most commerce to these points. Naval action simply accomplishes the task more rapidly.

On the other hand, comprehensive trade control structures such as those familiar in World Wars I and II are emergency developments. With the exception of vestigial remnants, such as the familiar export controls in the United States today, these comprehensive structures tend to be abandoned when hostilities cease. For trade

³⁹ *Ibid.*, 288-289.

⁴⁰ Castren, *The Present Law of War and Neutrality*, 292 (1954). This blockade was imposed in the so-called "Winter War." It was not reimposed after the German attack on the Soviet Union.

⁴¹ Brodie, *Guide to Naval Strategy*, 236, 244; Cagle and Manson, *The Sea War in Korea*, 337-343 (1957); Field, *History of United States Naval Operations: Korea*, 58-9, 319-21, 366-7 (1962).

interruption beyond the capability of limited "peacetime" administrative trade control structures, or when speed is necessary, there is no substitute for naval blockade.

A modern blockade will apply the weight of the blockading force at a great distance from the area blockaded. Although not a blockade, the Cuban Quarantine of 1962 illustrates the broad zone of operations required against a convoluted and indented shoreline open to many approaches from the sea.

The less blockade running, the closer operations may be to the blockaded area. In the blockade of North Korea, the blockading force was employed principally for coastal bombardment and for destruction of small coasting vessels. Although Red China and the Soviet Union protested the blockade, published reports indicate no major efforts to run it. Land transit routes, determined by the military situation of the North Korean Army, seemed preferred by Red China and the Soviets.

Although the weight of the blockading force may be applied at a distance, small naval units probably will operate in the immediate vicinity of the ports or shoreline. Aircraft and hovercraft are desirable for this purpose. Small conventional surface units might also be used. Aircraft, particularly helicopters, and submarines will be used for reconnaissance, for visits to vessels approaching the blockade, and perhaps for seizures of blockade runners.

A blockade in depth may be used as in *General Situation 7* to isolate an area until the intentions of a more formidable adversary can be determined. Such a blockade also might be imposed quickly and as quickly lifted in the execution of economic sorties.

The role of such blockades will be limited in general wars. There will be other demands upon naval forces. NAVAD blockades will be characteristic of these general wars, with naval blockades, such as that described, reserved to accomplish limited and specific objects.

Major Legal Features of Naval Blockade

The major legal features of naval blockade have remained almost static since the Declaration of Paris, 1856. However, there have been changes in blockading techniques and international organizations may now be blockaders.

The Security Council may declare a blockade under Article 42 of the Charter. Blockades may be recommended by the General Assembly or appropriate policy organs of several regional security organizations including the Organ of Consultation of the Organization of American States.

When international organizations participate in a blockade, the

legal requirements for blockade may change. The general community is likely to recognize fewer "nonparticipation" or "neutrality" contentions by member states previously committed to support policies of the blockading organizations.

*Blockade Must be Declared and Established
by Competent Authority*

To be binding legally upon nonparticipants, a blockade must be declared and established by *competent* authority. The criteria used to determine "competence" of the authority have received scant attention by publicists.

Infrequently, "competence" is determined by prior agreement among states possibly to be affected by a blockade. The salient current example is the competence to blockade conferred upon the Security Council by Article 42 of the United Nations Charter.

Absent a treaty, the criteria usually invoked are the ability and apparent intention of the blockading authority to discharge its international legal responsibilities. Relevant to these findings of ability and intention are adequate instructions to the blockading force and control by the authority over activities of the force. Judicial processes to pass upon the claims of nonparticipants, such as prize court procedures, must also be provided by the blockading authority.

Invocation of the criteria described has tended to confine competence to blockade to recognized governments of recognized states. Competence to blockade has been denied insurgents, although state determinations in these cases have been influenced by the stability, size and success of the insurgent group.⁴²

⁴² The first naval blockade was imposed in 1584 by Dutch insurgents against ports of Flanders in the hands of Spain. Under the Nyon Agreement of 1937, major European powers refused to concede belligerent rights to the *de jure* government of Spain or to the insurgents. The British, for example, refused to recognize a naval blockade proclaimed by the Spanish insurgents.

Professor Hyde states: "It is improbable that the United States would at the present time be disposed to pay deference to a blockade instituted by unrecognized insurgents, although it might under some conditions respect their effort, if effectual, to close ports under their actual control by measures that were not sought to be enforced on the high seas." III Hyde, *International Law*, 2186 (2d Ed., 1947).

State Department papers of the late 19th and early 20th centuries reveal respect for insurgent blockades, although some of these "blockades" may have been regarded as "port closures" by action within territorial waters. See *Foreign Relations of the United States, 1893*, 98-99. *Foreign Relations of the United States, 1909*, 454-455. *Foreign Relations of the United States, 1910*, 756-757.

See *Naval War College, International Law Situations, 1901*, 110-137. (Discus-

When insurgents are denied competence to blockade, they may act within the territorial waters of the state within which the insurgency occurs to deny delivery of property of a military nature to the opposing government. Recognition of this claim to deny military goods to the opposing government, does not include recognition of an insurgent right to seize a ship of a nonparticipant for breach of blockade. It is probable requisitions of ships and cargoes within territorial waters will have the same limited legal effect of requisitions of goods on land.

A feature of increasing importance in characterizations of competence to blockade is compatibility of the intensity of coercion by the blockading authority with commitments made by the authority under the United Nations Charter. A spectrum in degrees of coercive acts will be involved in a particular blockade; and overall intensities of coercion among different blockades may vary. Typically, coercive intensities in blockades have been so high that publicists have described blockades in the past as belligerent acts. The stage is set for declarations of neutrality by nonparticipants.⁴³

With the sovereign right to resort to war eliminated in the United Nations Charter, blockades will come under close scrutiny as possibly illegal applications of coercion. However, the sophisticated abandonment of a war-peace dichotomy in legal thinking may lead to exact discriminations concerning the reasons for blockade and the degree of coercion actually involved. Automatic characterizations of blockades as "acts of war" may be avoided.

A naval commander acting for a competent authority may declare a blockade.⁴⁴ A blockade is not established by United States naval forces unless directed by the President.

sion of proposed blockade by Chilean insurgents in 1891, said to have been a right conceded by the British on the usual condition of effectiveness, and Brazilian blockade of 1893-94); *Naval War College, International Law Situations*, 1902, 57-83. (Collection of statements of publicists relevant to competence to declare a blockade with George Grafton Wilson and Hay letters concerning blockades by insurgents—Hay's position being "Insurgents not yet recognized as possessing the attributes of full belligerency cannot establish a blockade according to the definition of International Law.") VII Moore, *Digest of International Law*, 785-788 (1906); VII Hackworth, *Digest of International Law*, 169-173 (1943); II *United States Foreign Relations*, 432 (1924) (U.S. opposition to proposed Huerta blockade of Tampico). For a discussion of United States policy concerning the "blockade" by the Spanish insurgents, see *Naval War College, International Law Situations*, 1938, 95-98.

⁴³ A blockade does not spring into existence upon a declaration of war. It must be declared and notified by the blockading power.

⁴⁴ See Colombos, *International Law of the Sea*, 585 (3d Ed., 1954).

*Character of the Declaration:
Notification to Nonparticipants*

Breach of blockade or attempted breach is treated as an offense against the law of the blockading state. Vessels of nonparticipants are subject to seizure. The vessel and its cargo may then be condemned in prize proceedings.

Because of the property loss facing owners of vessels and cargoes through seizures, detentions and possible condemnations for breach or attempted breaches of blockade, a rudimentary form of procedural due process must be followed by the blockader. There seems general agreement that a vessel of a nonparticipant should not be seized until it has actual or constructive notice of the blockade or unless notice is actually given by the blockading force before the alleged breach or attempted breach. There has been diversity in practice as to the method and time of delivery of the notice.

The Declaration of London, 1909, is a guide to declaration and notice requirements upon which delegates of major naval powers could agree in the early 20th century. By Article 8, a Declaration of Blockade and notice of the declaration were required for the blockade "to be binding." Subsequent articles of the Declaration make it clear that "binding" means a vessel of a nonparticipant should not be seized without actual or constructive notification. The Declaration of Blockade is required by Article 9 to state the date the blockade begins, geographical limits of the coast blockaded and the delay allowed neutral vessels for departure.

Current practice requires the time as well as the date of the blockade be stated. If the blockade is to extend to air traffic, this should be stated in the Declaration of Blockade as part of the requirement of geographic limits. Action contemplated by the blockading power with respect to submarine traffic should be declared.

Delegates to the 1908 London Conference understood a reasonable time should be granted for departure of neutral vessels.⁴⁵ Times usually have been established for departures by neutral vessels, ranging from 2 to 30 or more days.⁴⁶ A failure to state a time for

⁴⁵ See *Naval War College, International Law Topics, 1909*, 37.

⁴⁶ The United States Blockade Proclamations applying to Northern Cuba, to Southern Cuba and San Juan, Puerto Rico, allowed 30 days for departure of neutral vessels. *Foreign Relations of the United States, 1898*, 769 (Northern Cuba), 773 (Southern Cuba and San Juan).

This time exceeds that likely to be allowed today. Colombos, commenting upon Hall's statement that 15 days is the time usually allowed, declares this excessive under modern conditions. Colombos, *International Law of the Sea*, 585 (3d Ed., 1954), Fn. 3. Professor Hyde doubts any minimum number of days of grace are required. III Hyde, *International Law*, 2216 (1947).

departure in the Declaration of Blockade does not, as Article 9 suggests, preclude seizure of a neutral vessel for breach or attempted breach of blockade. However, neutral vessels which depart promptly after notification should be permitted to pass.⁴⁷

This limited privilege accorded neutral vessels extends only to neutral vessels entitled to fly a neutral flag at the time of notification. A vessel transferred from enemy ownership after notification can be seized. The privilege of withdrawal does not extend to cargo. However, blockading powers have frequently permitted cargo sent in on the neutral vessel before notice of the declaration, retained in neutral ownership and then withdrawn in good faith, to pass the blockade. These withdrawals of neutral cargo present special problems which may require diversion of the departing vessel for search. In most instances under current conditions of sea warfare it is in the interest of both blockader and nonparticipant for the vessel to depart in ballast.

The Declaration of Blockade must be notified by the terms of Article 11 of the London Declaration to governments of neutral powers or to their "representatives accredited to it" and also to local

⁴⁷ Hague Convention No. 6 of 1907 stated it was desirable to allow the vessel of a belligerent in an enemy port to depart immediately or after a period of grace (Article 1). The British representative at the Hague Conference stated his government did not regard as obligatory the granting of any period of grace to an *enemy* vessel. See Hall, *The Law of Naval Warfare*, 29 (1921). Neutral merchantmen, by contrast, are entitled by custom to leave a blockaded area without seizure if they depart within a reasonable time.

No period of grace is required to be stated in the Declaration of Blockade or notices of it. Colombos, *International Law of the Sea*, 586 (3d Ed., 1954). Writers appearing to take the position that a period of grace must be granted expressly, probably simply restate the provisions in Article 9 of the Declaration of London of 1909. E.g., Smith, *The Law and Custom of the Sea*, 139 (3d Ed., 1959).

Article 16 of the Declaration of London, when read with Article 9, suggests the blockade is effective legally although the period of grace has not been stated. As a penalty upon the blockading force, neutral vessels in port at the time of the notification must be allowed to pass free. See *Naval War College, International Law Topics, 1909*, 47-49.

Lord Stowell, dealing with a notice delivered during the blockade of Montevideo, but failing to state neutral vessels could bring out cargo loaded before notification, declared in *The Rolla* /1807/ 6 C. Rob. 365, 371: "But the blockade is good, *pro tanto*; and the court will not vitiate the effect of it, merely on account of the omission of one of the conditions under which vessels might be permitted to go out. * * * Here it was a restriction imposed by the commander himself / * * * distinguishing the case from one in which the area of blockade was stated defectively * * * / who might possibly find himself under circumstances that would make such a restrain perfectly justifiable, though no such circumstances are stated. * * *"

authorities in the blockaded area. The local authorities are to inform foreign consuls in the blockaded area as soon as possible.

The doctrine of constructive notice, derived from the British, United States and Japanese practice, is adopted in part in Articles 14, 15 and 16 of the London Declaration.

The vessel of a nonparticipant or neutral within the blockaded area is presumed to know of the blockade when notice has been given by the commander of the blockading force to appropriate local authorities. This presumption is absolute (or irrebuttable).

If the vessel departs a neutral port after notification made in sufficient time to the state to which the port belongs, Article 15 of the London Declaration raises a *rebuttable* presumption of knowledge of the vessel. If, on the other hand, the vessel of a nonparticipant approaches the blockaded area in ingress, and does not know or cannot be presumed to know of the blockade, special notice to the vessel is required by Article 16. This special notice must be given by an officer of one of the ships of the blockading force. The notice is entered in the vessel's logbook, with entry of the day, hour and geographical position of the vessel.

Contemporary writers agree that no *special* form of notice is required. The special notice stipulated in Article 16 of the Declaration of London is conveyed as effectively by a visual signal, or by direct voice or radio contact as by boarding the vessel.⁴⁸

If boarding is feasible with reasonable safety to the blockading vessel, it is desirable to enter the relevant facts of notice in the logbook of the vessel or upon the papers establishing the nationality of a diverted aircraft. A printed copy of the Declaration of Blockade should be delivered to the officer in charge of the intercepted unit.

When the blockade is common knowledge in the port of departure, this knowledge is imputed to a departing vessel even though notice has not been given to the government of the port.⁴⁹ A neutral vessel in egress from a blockaded port may also observe sufficient signs of naval and air activity to put her on notice that a blockade has been

⁴⁸ "The Law of War and Neutrality at Sea," *Naval War College, International Law Studies*, 1955, 288.

⁴⁹ In *The Tutela* /1805/ 6 C. Rob. 177, the vessel sailed from Bordeaux with a cargo of wheat owned by the Spanish government. The vessel was seized by the British fleet blockading St. Lucar.

There had been no formal notification of this blockade to French authorities but the existence of the blockade was common knowledge in Bordeaux. The master heard of the blockade before he sailed from Bordeaux and remonstrated with the shipper. He had been obliged to proceed as he had signed the charter party before notice of the blockade. Lord Stowell condemned the cargo and vessel.

established.⁵⁰ Any presumption of knowledge of the blockade under these circumstances should rest lightly when the blockade is in depth.

Many of the vessels approaching a blockaded area will have been warned by radio that a blockade is established. Publicists have emphasized the improved intelligence net as a reason for deviation from formal notice provisions, such as those in Article 11 of the Declaration of London.⁵¹

Under special circumstances, a blockade may be so notorious that within a reasonable time after the blockade is announced notice may be imputed to all vessels and aircraft. An example is a blockade declared or recommended by the Security Council of the United Nations.

But when a naval blockade is established, such as the blockade established in *General Situation 7*, special notices to all vessels and aircraft approaching the blockaded area are advantageous both to the blockader and to the nonparticipant. The blockade is intended to deny supplies to an adversary and to prevent his export of materials. This denial must be accomplished with economy of force and with minimum disruption of public order.

It is in the interest of the blockader to hold diversions of vessels or their seizure to a minimum. Notice carefully delivered to vessels and aircraft of nonparticipants may cause voluntary withdrawals of units unprepared to test the effectiveness of the blockade.

The element of administrative convenience inherent in special notices is demonstrated in the confrontation of *Electra* by *Buchanan* in *Special Situation 7A*. The blockade has been established rapidly as a device to preserve the military *status quo* pending action by the United Nations or the Organization of American States.

⁵⁰ The *de facto* blockade, distinguished in British, American and Japanese practice from a *notified* blockade, is based upon patent naval activity which the master of a vessel in ingress or egress should be able to observe. Neutral vessels, leaving a blockaded port after the blockade has existed *de facto*, are subject to seizure without special notice. *The Vrouw Judith* /1799/ 1 C. Rob. 150; *The Hare* /1810/ 1 Acton 252 (blockade established by notification, driven off and reestablished without notification).

For a neutral vessel in egress, readily observable naval activity has been given weight when also coupled with other sources of knowledge by the master. E.g., *The Herald*, 70 U.S. (3 Wall.), 768 (1865).

A vessel in ingress through the blockaded area when the blockade is *de facto* is entitled to special notice before seizure if knowledge of the blockade is lacking. This knowledge may be gained from general notoriety in the port of departure but will not be imputed when there is confusion in the port of departure concerning the area blockaded. *The Franciska* /1855/ 10 Moore P.C. 37 (where it was also held a blockade of Riga was not applied impartially).

⁵¹ E.g., III Hyde, *International Law*, 2206-2209 (1947).

While *Electra's* master may have received notice of the blockade by radio, there is a chance he has not received this notice and will change his course if notice is given. The most effective notice of the blockade can be given by visiting *Electra*, delivering a printed copy of the Declaration of Blockade to the master, and making appropriate entries of this fact in *Electra's* log. Probably under the circumstances this can be done with safety to *Buchanan*.

If the master resists a visit, or if a visit appears unduly hazardous, special notice should be given by visible or audible signals. If the master ignores these signals and *Electra* continues on her course, she should be seized. There is a strong case for seizure because the United States has conformed to the requirements stated in Article 11 of the Declaration of London. These reflect international custom on the point.

Blockade Must be Effective to be Binding

The Declaration of Paris, 1856, states in part: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." The Declaration of London, 1909, reaffirmed this point in Article 2, adding in Article 3 that "effectiveness" of a blockade is a question of fact.

Although a literal reading of the English translation of the Declaration of Paris might suggest a blockade was "effective" only if it precluded blockade running, by the interpretation generally accepted a blockade is effective if maintained by instrumentalities sufficient to render dangerous ingress to or egress from the blockaded area.⁵² Intermittent penetrations by blockade runners do not impair the effectiveness of the blockade if the breaching unit risks probable seizure or destruction.

⁵² This, essentially, is the statement of effectiveness by Dr. Lushington in *The Franciska* /1855/ II Spinks, 113, 120, 130 (reversed on other grounds in /1855/ 10 Moore, P.C. 37). The blockade is effective even though some blockade runners pass it during darkness or during fog or during the period in which a blockading vessel has left her station in pursuit of another blockade runner.

In *The Olinde Rodrigues*, 174 U.S. 510 (1899), a French vessel entered San Juan, Puerto Rico, after the United States proclamation of blockade of that port and upon egress was warned of the blockade by the auxiliary *Yosemite*, the only blockading vessel. Returning to San Juan at a later date, *Olinde Rodrigues* was seized by U.S.S. *New Orleans* which had replaced *Yosemite*.

Accepting Dr. Lushington's statement of "effectiveness" in *The Franciska*, the Supreme Court stated a blockade could be maintained by one cruiser if in fact ingress and egress through the blockade were rendered dangerous.

The Court declared: " * * * Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a

Blockading operations must be continuous. If blockading operations are interrupted, the blockade becomes ineffective. A new declaration and notifications are required if the blockade is re-established.⁵³

blockade. It is enough if the danger is real and apparent. * * * " 174 U.S. 515. Relevant to the issues of danger are the nature and extent of the coast blockaded; the character, disposition and degree of efficiency of the blockading force; and the number of vessels entering and departing a blockaded port without examination and seizure compared with the records of vessels examined or seized.

Statements by the commander and officers of a blockading force relative to its efficiency and effectiveness have been given weight in prize proceedings. Dr. Lushington in *The Franciska*, commenting upon depositions by Sir Charles Napier, commanding the force blockading Riga, states: "If Sir Charles Napier, with this evidence before him, with his means of forming a correct judgment, has come to the conclusion that the blockade was duly maintained, I think that a Judge sitting in this chair would, in the absence of conflicting testimony upon such evidence, feel himself compelled to come to a similar conclusion; and I think so also, more especially because if Sir W. Grant deemed the opinion of a commander-in-chief adequate evidence of the competency of a squadron to execute a blockade, *a fortiori*, *multum a fortiori*, such opinion would be of force when the question was of its actual maintenance, and when the evidence from which the conclusion was to be drawn consisted of logs and other statements, upon which none but a nautical person can form a very satisfactory judgment. * * * " II Spinks at 126.

⁵³ Art. 12, Declaration of London, 1909. See *Naval War College, International Law Topics, 1909*, 41. In *The Hoffnung* /1805/ 6 C. Rob. 112, a British squadron under Sir John Ord, blockading Cadiz and St. Lucar, was driven off by force on 10 April. While no blockade was maintained, the British government on 25 April declared and notified a blockade of the two ports. Lord Collingwood reestablished the blockade on 8 June, or at least appeared before the ports on that date.

The court received in evidence a letter of 23 July to neutral consuls in Cadiz which might be construed as notification of the reestablished blockade. *Hoffnung*, however, sailed from Nantes on 17 July and was seized at "a considerable distance" from the coast of Spain.

Lord Stowell refused to condemn either the Swedish vessel or the Spanish cargo, holding the notice of 25 April insufficient to cover the reestablished blockade and the evidence of a *de facto* blockade insufficient to charge the vessel or the shippers with knowledge of it. He cited *The Christina Margaretha* /1805/ 6 C.. Rob. 63, in which a ship on egress from Cadiz on 4 April passed the *de facto* Ord blockade without hindrance but was seized in the Channel off Orfordness by a British cruiser after the declaration and notification of 25 April. Lord Stowell refused to allow expenses to the captors.

Referring to this case in *The Hoffnung*, Lord Stowell commented: (6 C. Rob. 117) " * * * It was argued on that occasion, that neutrals were bound to act upon such presumptions * * * /that the blockade continued or would be resumed/ * * * and on the same principle on which it has been held that when a blockading squadron is driven off by adverse winds they are bound to presume that it will return, and that there is no discontinuance of the blockade.

"But certainly the two cases are very different. When a squadron is driven

Continuity is unbroken if units of the blockading force are driven away by stress of weather⁵⁴ or depart for a purpose connected with the blockade,⁵⁵ such as pursuit of a blockade runner, and immediately return to their stations. There is no requirement that the same units or number of units constitute the blockading force for continuity;

off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces, therefore, a very different train of presumptions in favor of the ordinary freedom of commercial speculations. In such a case, the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed, and, therefore, if it is to be renewed, it must proceed *de novo*, by the usual course, and without reference to the former state of facts, which has been so effectually interrupted.

“On this principle it was that the court held the former blockade to have become extinct, and intimated an opinion that there should be a repetition of the same measures, on its recommencement, to bring it to the knowledge of neutral states, either by public declaration, or by the notoriety of the fact.”

In *The Hare* /1810/ I Acton, 252, the reestablished blockade by Lord Collingwood was held a blockade *de facto*, binding without special notice upon an American vessel in egress from Cadiz. By the time of this seizure, the reestablished blockade had become notorious and vessels were charged with knowledge of it when leaving the blockaded port.

Article 13, Declaration of London, 1909, requires notification if the blockade is raised voluntarily or if any limitation to it is introduced. See *Naval War College, International Law Topics*, 1909, 41. A blockade *de facto* expires *de facto*. See *The Neptunus* /1799/ 1 C. Rob. 170, 171.

⁵⁴ In *The Columbia* /1799/ 1 C. Rob. 154, Lord Stowell had “no hesitation in saying that the blockade * * * / of Amsterdam / * * * was broken” when the master of an American vessel sailed for that port with the intention of entering “if the wind should continue unsteady and keep the English cruisers off the Dutch coast.” See to the same effect *The Frederick Molke* /1798/ 1 C. Rob. 86.

⁵⁵ See VII Moore, *Digest of International Law*, 844 (1906) (quoting Instructions to U.S. Blockading Vessels and Cruisers, 1898. The same point was restated in the Instructions of 1917). Professor Stone declares: “* * * It is doubtful whether any circumstances other than stress of weather will permit withdrawal without interruption of blockade * * * though on principle a brief interruption to allow pursuit of a refractory blockade-runner should be on the same basis. * * *” Stone, *Legal Controls of International Conflict*, 496 (1954) Fn. 33.

During the Federal blockade of Charleston, S.C., which was maintained in 1861 by U.S.S. *Niagara*, this vessel was ordered replaced by U.S.S. *Harriet Lane*. *Harriet Lane* was “a day or two” late in arriving and *Niagara* nevertheless left her station. Secretary Seward maintained the blockade had not been raised in a manner which required notice of its reestablishment. See VII Moore, *Digest of International Law*, 843 (1906).

nor is there a requirement that units of the blockading power maintain the blockade. Ships of allies may be used.⁵⁶

Exceptions for passage of the blockade may be allowed by the blockading power without rendering the blockade ineffective. Warships and military aircraft of nonparticipants may be allowed ingress and egress, as may other vessels and aircraft of a nonparticipant when either under urgent distress or engaged in *bona fide* humanitarian missions.⁵⁷

⁵⁶ During the Italian Adriatic blockade in 1915, a number of ships were seized by French vessels acting under Italian orders. Some of the claimants contended the Italian blockade was not effective because maintained in part by French warships. The Italian Prize Commission rejected these arguments. E.g., *The Aghios Spiridon* /1916/ *Gazetta Ufficiale*, 10 Feb. 1916, No. 33; Fauchille et Basdevant, *Jurisprudence Italienne en Matiere de Prises Maritimes*, 5 (1918).

The blockade should be effective even if cooperation by vessels of the non-declaring power is voluntary. But a claim of ineffectiveness should be avoided in these cases by joint declarations and joint notifications.

⁵⁷ The exceptions mentioned are relevant principally to the effectiveness of the blockade. If the exceptions are granted frequently, the effectiveness of the blockade may be brought into question.

Apart from the issue of effectiveness, there seems no limit to exceptions, other than in the three categories mentioned, provided neutrals are treated impartially. Blockade operations by the United States during the Spanish-American War were noted for the numerous exceptions made for passage. See *Naval War College, International Law Situations, 1901*, 166-175.

Articles 6 and 7 of the Declaration of London, 1909, state exceptions permissible for warships and vessels in distress. See *Naval War College, International Law Topics, 1909*, 31-32. Warships must conform to the conditions of ingress and egress established by the blockade commander. See VII Moore, *Digest of International Law*, 852 (1906). The exception for vessels in distress, apart from the Declaration of London, is well established. See *The Fortuna* /1803/ 5 C. Rob. 27; *The Diana* U.S. (7 Wall.), 354 (1868). *The Nuestra Senora de Regla* U.S. (17 Wall.), 354 (1868). Nothing but an absolute and unavoidable necessity will justify entering a blockaded port without permission of the blockade commander. *The Hurtige Hane* /1799/ 2 C. Rob. 124; *The Elizabeth* /1810/ Edwards, 198; *The Charlotta* /1810/ Edwards, 252; *The Panaghia Rhomba* /1858/ 12 Moore P. C. 168.

There is no mention in the Declaration of London, 1909, of an exception to pass the blockade for vessels upon humanitarian missions. *Hague Convention XI* (1907) Article 4, exempts from capture vessels charged with religious, scientific or philanthropic missions. An exemption from capture does not mean that a vessel or aircraft will be granted an exception to pass a blockade.

Thus, both public and private hospital ships are exempt from capture or attack by Article 22, 24 and 25 of *Geneva Convention, Armed Forces at Sea* (1949). Yet in Art. 31 is made clear that these vessels and their communications can be controlled. They can be searched, directed upon a certain course and detained for a period of seven days from the time of the interception.

Substantially the same *formulae* applied to hospital ships are stated in

Small unarmed fishing vessels and small boats used in local trade on the coast of the blockaded state may be permitted to engage in their usual activities without placing the effectiveness of the blockade in jeopardy.⁵⁸ This does not apply to deep sea fishing vessels,

Hague Convention X (1907) which the Geneva Convention will replace. The control of a belligerent over these vessels is so extensive that without an attack or capture a blockade clearly can be enforced against them. The relevant cases are few.

Whether the object of the voyage is humanitarian or philanthropic is determined by the blockader. See *The Adula*, 176 U.S. 361, 379 (1900) (vessel entering port to remove refugees said one employed for the personal profit of the charterer "and only secondarily, if at all, for the purpose of humanity"); *The Haelen* /1918/ Grotius Annuaire International, 254 (chartered vessel carrying wheat for children to Belgium not entitled to exemption because not engaged in humanitarian work prior to war).

When the vessel passes the blockade, the voyage must be limited to the humanitarian object. *The Rose in Bloom* /1811/ 1 Dodson, 57 (American vessel removing distressed seamen from blockaded port of Bayonne but also carrying cargo unrelated to this mission condemned with all cargo except stores carried for humanitarian mission); *The Aghios Nicolaos* (No. 2) Journal Officiel (1918), 8944 (vessel departed from assigned route and loaded cargo).

Although the Geneva Conventions of 1949 do not mention blockades, exceptions for humanitarian reasons may be based upon a number of their provisions. Ships chartered to transport medical equipment and supplies exclusively intended for the treatment of wounded and sick members of the armed forces or the prevention of disease are to pass. "The particulars regarding their voyage must be notified to the adverse Power and approved by the latter." *Geneva Convention, Armed Forces at Sea* (1949), Article 38.

Medical and religious personnel and equipment to remove wounded and sick from a besieged area may be allowed to pass. *Geneva Convention, Armed Forces at Sea* (1949), Art. 18; *Geneva Convention, Civilian Persons*, Art. 17.

Neutral craft responding to an appeal by parties to the conflict or those which of their own accord collect wounded, sick or shipwrecked persons "shall enjoy special protection and facilities to carry out such assistance." *Geneva Convention, Armed Forces at Sea* (1949), Article 21.

Consignments of medical and hospital stores; objects necessary for religious worship; and essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases are allowed to pass if the belligerent is satisfied there are "no serious reason for fearing" diversions of the products for military use or an accrual of a definite advantage to the war effort or economy of the enemy and other specified consequences, *Geneva Convention, Protection of Civilian Persons* (1949), Article 23. The Conventions state certain exceptions apparently mandatory for the blockader. These are mentioned in Fn. 59, *infra*.

⁵⁸ See *The Paquete Habana*, 175 U.S. 677 (1900). *Hague Convention XI* (1907), Art. 3 exempts fishing boats used for fishing along the coast or small boats employed in local trade from capture. The British position has been that the exemption is a matter of comity only. E.g., *The Young Jacob and Johanna* /1798/ 1 C. Rob. 20; Colombos, *International Law of the Sea*, 474-475 (3d Ed., 1954). See *The S. S. Doron*, 28 Int. L. Rep. 61, (U.A.R. Prize Ct. 1959) (where

spotter aircraft for fishing vessels or large vessels trading between coastal ports.

The exceptions mentioned are in the discretion of the blockade commander upon the conditions prescribed by him. During the blockade of North Korea by United States and other naval units, no exception was made for small fishing boats and small coastal craft. These were seized or destroyed. The purpose was to cut off a major source of food supply for the North Korean Army and to stimulate anticommunist sentiment among the fishermen.⁵⁹

fishing vessel was seized having on board a powerful radio transmitter and receiver, a bathometer and cases containing luminous signals); *The Goulfar II*, *Ann. Dig.* (1943-45), 469, Case No. 169 (Prize Court of Hamburg); *The Fred Neumann*, *Ann. Dig.* (1946), 405, Case No. 175, Conseil des Prises.

⁵⁹ See Cagle and Manson, *The Sea War in Korea*, 296 (1957). In 1938 the Korean fishing industry had ranked third in the world and the Koreans had consumed about 300,000 tons of fish annually. *Hague Convention XI* (1907) because of the general participation clause, did not apply to the Korean conflict. The use of these vessels to mine Korean waters would provide a legal basis for attacks upon them.

Although under ordinary circumstances, the destruction of fishing vessels and small coastal shipping would be highly questionable in view of *The Paquete Habana*, Fn. 58, *supra*, there was a close link between fishing activities and supply of the North Korean and Chinese Volunteer Armies, both of which tended to live off the land (or sea—as the case might be).

Disturbance of the fishing fleet had an immediate military bearing upon land operations. This will be characteristic of economic warfare under modern conditions although the relationship between denials of food and the movement and tactics of armies unquestionably was accentuated in the Korean conflict.

Naval practices during World Wars I and II, in which coastal fishing vessels and shipping frequently were attacked, have eroded the position taken in continental cases and in *The Paquete Habana* concerning immunity of these vessels. The matter is believed usually in the discretion of the blockade commander, although this discretion should be exercised to avoid unnecessary destruction.

This does not mean that destruction of fishing vessels will be discretionary under *all* circumstances. *Hague Convention XI* (1907), Art. 4 may apply. Also under Article 59 of *Geneva Convention, Civilian Persons* (1949), a contracting party is obligated to permit free passage of consignments of foodstuffs, medical supplies and clothing to the inadequately supplied population of an occupied territory as part of a relief scheme. If an impartial humanitarian organization, such as the International Committee of the Red Cross, sought cessation of interference with the fishing fleet of the occupied territory, and coupled this with assurances that the fish caught would be used for the relief of the needy population, it is believed the interferences could not continue consistently with the treaty obligation.

This is one of the few nondiscretionary features related to blockades found in the Geneva Conventions of 1949. Others are the obligation to allow a hospital ship egress from a port which has fallen into the hands of the enemy, *Geneva Convention, Armed Forces at Sea* (1949), Art. 29; and to allow the passage of mail and relief supplies for prisoners of war and interned civilians. *Geneva*

A blockade may be limited to ocean surface traffic. The blockade need not extend to submarine or air traffic and will be effective also despite the exclusion from interception of certain cargo, such as the food and medical supplies mentioned in the Declaration of Blockade stated in *General Situation* 7.⁶⁰

Large cargo submarines may require future "effective" blockade to be extended to subsurface as well as surface traffic. Currently there is no requirement that a blockade extend to subsurface vessels or to aircraft. Depending upon the size and location of the blockaded area, the blockader may reasonably require submarines and aircraft to travel upon stipulated routes through designated zones or may prescribe routes for free travel.

Probably the most perplexing current issue relating to the effectiveness of a blockade results from development and use of submarines, aircraft, mines and electronic scanning devices in naval combat. In view of these new developments in hardware and techniques for its use, how large a force is required for an effective blockade and what must be its composition? There are no pat answers.⁶¹

Convention, Prisoners of War (1949), Arts. 70-75; 77; *Geneva Convention, Civilian Persons* (1949), Arts. 106-110.

⁶⁰ A clear basis for this exception is to be found in *Geneva Convention, Armed Forces at Sea* (1949), Art. 21. See Fn. 57, *supra*. *Geneva Convention, Civilian Persons* (1949), Article 59 makes mandatory under certain circumstances passage of food, medical supplies and clothing for the inadequately supplied population of an occupied territory. See Fn. 59, *supra*.

Economic attacks upon food supply are discussed subsequently. However, it is believed the extreme position taken by the Supreme Court of Hong Kong in *The Paklat* 1 Br. & Col. Prize Cases 515 (1915) concerning the discretion of a blockader in forbidding relief activity is now subject to exceptions. *The Paklat*, a German (enemy) vessel sailed from Tsingtao with refugees and was captured by the British. The vessel sailed before Tsingtao was blockaded but was captured after the blockade was established.

The defense was made that the vessel was engaged in a humanitarian mission. Condemning the vessel, the Hong Kong Court stated in dicta: (*Ibid.*, 518) " * * * /N/o rule of law exists which obliges a besieging force to allow all noncombatants or only women, children, the aged, the sick or wounded, or subjects of neutral Powers to leave the besieged area unmolested. Although such permission is sometimes granted, it is in most cases refused, because the fact that noncombatants are besieged together with combatants, and that they have to endure the same hardships, may, and very often does, exercise pressure upon the authorities to surrender." Presumably the Court would consider denials of food and medicine to the besieged noncombatants proper to bring pressure for a surrender. The case is criticized in Colombos, *The Law of Prize*, 150-151 (2d Ed., 1940).

⁶¹ An interesting consideration of new weapons, detection methods, and transportation systems available for application to blockade may be found in

Most commentators upon the issue of "effectiveness" have insisted the blockading force contain some surface units. It has been stated, for example, that at least one surface unit must be present in the blockaded area.⁶²

A surface vessel clearly has advantages as a blockading unit if the blockading power has air superiority, superiority in surface sea power, and antisubmarine warfare capability. Often a surface vessel will have adequate personnel to serve as prize crews of seized vessels. It has the capacity to rescue survivors of vessels sunk for resisting seizure. While the matter is speculative, the examination by a surface unit of papers of a vessel approaching the blockaded area may be facilitated. There is perhaps less of a chance that a vessel will attempt to resist a surface unit approaching it to examine its papers than it will attempt to resist a helicopter or submarine approaching for the same object.

If the blockader lacks surface capability, then, as did Germany in two wars, the tendency will be to resort to air or submarine interdiction. There is no doubt these units can render dangerous ingress to and from a blockaded area. The question seems to be whether a blockader using only these units can properly discharge the responsibilities of a blockading power. One of these responsibilities is to maintain minimum order—to enforce the blockade without unnecessary destruction. Whether this responsibility can be discharged using only air and submarine units or using only one or the other should depend upon the facts of the particular conflict.⁶³

A situation can be imagined in which a blockade is maintained by land-based aircraft supported by submarines. Vessels approaching

Powers, "Blockade: For Winning Without Killing," 84 *Naval Inst. Proc.*, 61-66 (August 1958).

⁶² See II Oppenheim, *International Law*, 780 (7th Ed., Lauterpacht, 1952). (Blockade effective by land batteries if supported by at least one man-of-war.) Colombos appears to consider some surface units necessary. See Colombos, *International Law of the Sea*, 581 (3d Ed., 1954); *Naval War College, International Law Studies*, 1955, 289 Fn. 13.

⁶³ See McDougal and Feliciano, *Law and Minimum World Public Order*, 493-497 (1961). These authors state at 494:

The lawfulness of the objective of embargoing, more or less comprehensively, commerce with the enemy being thus established, the lawfulness of any particular modality of achieving this objective in possible future contexts rationally depends upon the appraisal of the relative destructiveness of such modality as compared to any other available alternative modality, rather than upon conformity to practices technologically obsolete. Such an appraisal, essentially an appraisal of reasonableness in detailed context, entails the careful relation of specific components of contexts to the relevant competing policies of military effectiveness and minimum destruction of values.

the blockaded area could be notified if necessary and visited by helicopters or other suitable aircraft. Necessary seizures could be accomplished by submarines; and vessels resisting seizure could be destroyed either by submarine or aircraft and survivors perhaps rescued by them.

A blockade of this nature should be distinguished from a war zone established as a reprisal in which neutral commerce is indiscriminately destroyed without warning, such as the German war zones in World Wars I and II, and from attacks upon enemy shipping as in American operations in the Pacific during World War II.

If a blockade is frequently challenged (that is, if merchantmen of nonparticipants frequently attempt to run it), the presence of some surface units probably should be required. If challenges are few, submarine and air activity can be combined for the requisite effectiveness and at the same time discharge the blockader's responsibility to maintain minimum order.⁶⁴ In special situations, perhaps submarine activity alone or air activity alone would be adequate—although a blockade directed against air as well as surface transit would certainly require air support.

*The Blockade Must be Applied Impartially
to All Vessels and Aircraft*

The vessels of nonparticipants and those of the blockading authority must receive equal treatment.⁶⁵ If the blockade is extended to aircraft, the rule of impartiality applies to aircraft as well.

⁶⁴ *Hague Convention VIII* (1907), Article 2 prohibits laying automatic contact mines off the coasts and ports of the enemy with the sole object of intercepting commercial shipping. This Convention may not be applicable in a particular conflict because of its general participation clause.

Mining operations may be conducted as reprisals. Mined zones were used extensively in World Wars I and II to block or channel commercial traffic.

This technique may be anticipated in future wars, perhaps with permanent blocking of certain channels. Channels may be blocked by nuclear devices, unsweepable without substantial loss of life and property damage.

Colombos and other writers have considered Article 2 of *Hague Convention VIII* "illusory," because the state mining the waters may assert an object other than intercepting commercial shipping. See Colombos, *International Law of the Sea*, 583 (3d Ed., 1954); McDougal and Feliciano, *Law and Minimum World Public Order*, 495 (1961), Fn. 271.

⁶⁵ Declaration of London, 1909, Art. 5. See *Naval War College, International Law Topics*, 1909, 31; *The Success* /1812/ 1 Dodson, 131, 134 ("The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as of neutral ships; for it would be a gross violation of neutral rights, to prohibit their trade, and to permit subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded"); *The Franciska* /1855/ Spinks, 287, 292.

A blockading state cannot, for example, exclude merchant vessels of nonparticipants and allow ingress and egress to its own merchantmen. The impartiality doctrine does not apply to exceptions made for passage of the blockade, such as the privilege accorded warships to enter and depart blockaded ports.⁶⁶

The decision to grant an exception is made by the blockade commander in each case presented. Some warships can be granted ingress and egress and others excluded.

Except, however, in the recognized categories in which exceptions are permitted, impartiality is the rule. Merchantmen, when neither in urgent distress nor engaged in humanitarian missions, are not within the categories which a blockade commander can allow to pass in his discretion without raising the blockade. If *Electra* is allowed to pass the blockade, not only will an argument be available to non-participants that the blockade is raised, but if the blockade is re-

⁶⁶ Declaration of London, 1909, Articles 6, 7. See *Naval War College, International Law Topics, 1909*, 31-32; Colombos, *International Law of the Sea*, 583-584 (3d Ed., 1954).

The three exceptions—warships, vessels in distress and vessels upon humanitarian missions—do not appear subject to the rule of impartiality. If an exception is recognized for fishing vessels and other small vessels in coastal trade, although usually enemy vessels will be involved rather than vessels of neutrals, probably permission must be granted or withheld impartially. The practice is insufficient to evidence clear community policy on the point.

In transactions other than the “exceptions,” the impartiality rule applies although the problem is usually presented as one of “effectiveness” of the blockade.

In *The Juffrow Maria Schroeder* /1800/ 3 C. Rob. 148, Lord Stowell dealt with a vessel allowed to enter Le Havre in a lax blockade of that port and seized upon coming out. The vessel was restored under the rule of *The Neptunus* /1799/ 2 C. Rob. 110, where the vessel had been misled in entering Le Havre by an unintentionally false statement of the captain of a British frigate.

Lord Stowell commented (at 3 C. Rob. 158): “It is impossible for me to say this, without observing at the same time, on the great mischief that ensues from this sort of inattention practised by our cruisers. It is in vain for governments to impose blockades, if those employed on that service will not enforce them. The inconvenience is very great and extends far beyond the individual case; reports are eagerly circulated, that the blockade is raised; foreigners take advantage of the information; the property of innocent persons is ensnared, and the honor of our own country is involved in the mistake.”

And see *The Rolla* /1807/ 6 C. Rob. 365 where Sir Home Popham had allowed a group of slave ships to enter Montevideo, apparently upon humanitarian grounds. Lord Stowell stated: “It would have been better, undoubtedly, and more regular, that this intention should have been notified to the governor in the same manner as the blockade itself. It would then have been a clear and distinct limitation, and the exception would have been understood according to its proper limits, because slave ships are in no manner privileged by law, or put upon a different footing from other ships.” (6 C. Rob. at 373.)

imposed nonparticipants can complain of discriminatory action in the earlier blockading operation.

*The Blockade Must Not Bar Access to Neutral
Ports or Air Termini*

A naval blockade must not bar ingress to or egress from sea or air termini of nonparticipating states.⁶⁷ The naval blockade of Nueva and Antioka bars no access to ports of nonparticipants unless it may be argued that the sea and air activity incident to the blockade is so extensive that shipping to ports of nonparticipants is being harassed or interdicted. Whether this harassment or interdiction occurs is a question of fact in each blockade.

Objections by nonparticipants based upon such alleged interference may be obviated if the blockading authority is prepared to assume the administrative burden required to permit free traffic through the blockaded area between ports of nonparticipants. Flexible navicerting, clearcerting or similar "pass" procedures will expedite this movement. If the continuous voyage doctrine is enforced, and enforcement of this doctrine may be unnecessary when the naval blockade is quickly imposed and is of short duration, an effective intelligence service in ports of origin and call may avoid useless interceptions.

Under special circumstances, not present in *General Situation 7*, the administrative burden upon the blockading authority may be exceptionally heavy. Examples are when sea traffic is interdicted: (a) into rivers when some riparian states are nonparticipants; (b) into canals used as routes between nonparticipating states; and (c) when a strait between a participant and nonparticipant is blockaded.

Unless measures can be taken to permit free movement of traffic to and from the ports of nonparticipants under these circumstances, the blockading authority assumes the risk of legitimate retaliatory action by the nonparticipant as well as claims for losses resulting from the interference. Distinguished authorities have suggested in some of these situations a blockade valid under international law cannot be established.

Professor Smith, for example, appears to take the position that an effective blockade of Copenhagen would not be viable legally because it would interfere with access to the opposite coast of Sweden.⁶⁸ Professor Smith is also of the opinion that "long-distance"

⁶⁷ Declaration of London, 1909, Article 1, 18. See *Naval War College, International Law Topics*, 1909, 25, 18. Colombos, *International Law of the Sea*, 592 (3d Ed., 1954). A state may blockade its own ports held by the enemy. II Oppenheim, *International Law*, 771 (7th Ed., Lauterpacht 1952).

⁶⁸ Smith, *The Law and Custom of the Sea*, 140-141, (3d Ed., 1959).

blockades (described in this text as NAVAD blockades) imposed against Germany in World Wars I and II are not likely to be repeated in any future war in which neutral powers desire and are able to insist upon their neutral rights.⁶⁹ Judge Lauterpacht states that a river cannot lawfully be blockaded except when all the riparian states are cobelligerents against the blockading state, or when they are all belligerents and the cobelligerents of the blockading state assent to the blockade.⁷⁰

Precedents cited to support these positions tend to antedate development of modern communications facilities and means for the quick identification of vessels. These new techniques can be employed to facilitate free passage of vessels to and from the ports of non-participants. A mere apprehension of possible interference by naval units of the blockader under such circumstances does not constitute interference as a fact. It appears possible to blockade legally any area when the appropriate steps are taken to insure free transit between ports of nonparticipants.

The appearance of an international organ, such as the Security Council of the United Nations as a blockading authority; or the imposition of a blockade upon the recommendation of the Security Council or the General Assembly; should alter radically the limitation that a naval blockade must not bar ingress to or egress from the sea and air termini of nonparticipating states. Only states not members of the United Nations would appear to be able to assert the claim to noninterference to its full extent. Members of the Organization have impliedly waived such objections in Article 2(2) and (5) of the Charter.

In the naval blockade of Korea this issue was not forced. The area of blockade operations was limited to avoid interference with Soviet ports and also the Soviet-leased North Korean port of Rashin.⁷¹ How much commerce moved in and out of Rashin has not been disclosed. But with these significant limitations upon the area blockaded and the deference shown for Red Chinese and Soviet freedom of transit between their respective ports, there was no legal basis for Red Chinese and Soviet objections to the blockade.

Suggested Solution: Special Situation 7 A

Electra, as a vessel of a nonparticipant in the conflict between the United States, Nueva and Antioquia, or at least as a nonparticipant in the particular confrontation, should be treated as a neutral in

⁶⁹ *Ibid.*, 141.

⁷⁰ II Oppenheim, *International Law*, 771-772, (7th Ed., Lauterpacht 1952).

⁷¹ See Cagle and Manson, *The Sea War in Korea*, 281 (1957), Fn.

maritime blockade. It is important to recognize Scythia's neutral status—and consequently the status of *Electra*—to maintain the blockade as an interim measure with maximum economy in the expenditure of values both by the United States and by other states affected by our naval action. Little could be gained by treating *Electra* as an enemy vessel and much could be lost by accelerating the dispute between Scythia and NATO to which United States is a party.

The Captain of *Buchanan* should repeat his special notice of the blockade to *Electra* allowing the maximum time possible for the master to consult his superiors by radio before bringing *Electra* to. If *Electra* then continues upon her course, she must be brought to by force if force is necessary. *Electra* must then be visited and searched. If a search at sea proves impractical, she must be diverted to a port where a thorough search can be accomplished. A diversion or seizure of *Electra* should be avoided if this can be accomplished and the blockade still be enforced.

The Captain of *Buchanan* may be able to persuade the master to change course when it becomes evident *Electra* will be seized if she attempts to run the blockade. A failure to seize *Electra* under such circumstances would provide an argument for all nonparticipants that the blockade has been raised.

Although *Electra* probably is owned by Scythia, she is not a warship to be granted a privilege to pass in the discretion of the blockade commander. There is no indication the vessel is in distress or engaged in a humanitarian mission. If Scythia desires to claim immunity of *Electra* from condemnation as a state-owned vessel, this point can be raised and tested if she is seized and the United States institutes condemnation proceedings.

The Captain of *Buchanan* has orders that no cargo will pass in ingress except food and medical supplies. No cargo will be permitted to pass in egress. He is expected by his superiors to execute his orders with deference to the maintenance of minimum public order and with a minimum destruction of values consistent with accomplishment of his mission.

C. CONTRABAND

Special Situation 7 B

The Organ of Consultation of the Organization of American States, considering the case of the United States placed before it as described in *General Situation 7*, determines Nueva has made an unprovoked attack upon the United States. This attack the Organ characterizes as "aggression" under Article 9(a) of the Rio Pact.

It agrees upon the use of armed force against Nueva and against Nuevan forces in Antioka. The use of armed force is to include participation by members of the Organization in the naval blockade established by the United States. Contraband regulations are to be enforced upon the high seas by naval units of the Organization.

You have been assigned to assist the Advisory Defense Committee in developing contraband instructions to be issued to naval forces of participating states. These instructions are to secure uniform enforcement of contraband regulations and to relate effectively contraband enforcement measures to the blockade.

The Advisory Defense Committee has received a letter from the Secretary of Defense of the Antiokan government in exile recommending food and medical supplies be placed upon the contraband list. Review the principles of contraband and formulate your recommendation to the Advisory Defense Committee whether a contraband list is necessary and, if so, whether food and medical supplies should be listed as contraband.

Discussion: Special Situation 7 B

The history of contraband reveals a constant increase in the economic requirements for war and a consistent readiness of belligerents to interdict transport of all resources useful to their adversaries in warfare. Items listed as contraband and the techniques developed for enforcing contraband regulations have been products of rough and ready compromises between belligerents and neutrals. Belligerents, usually, have enjoyed both the initiative and bargaining power as these compromises were achieved. Although the initiative will remain with the belligerent, the bargaining power of the belligerent may vary with the conflict situation.

Contraband Principles in Declaration of London

A "peacetime" consensus among major maritime nations concerning contraband was developed at the London Naval Conference of 1908 and expressed in the Declaration of London, 1909. This unratified Declaration has been described previously in this Chapter. Many of the basic contraband principles expressed in the Declaration were heavily eroded by the pressures of two global conflicts. However, some may still be applicable in limited wars.

The Declaration continued a distinction between "absolute contraband" and "conditional contraband," a distinction rooted in the writing of Hugo Grotius and the Treaty of Whitehall (1661)

between England and Sweden.⁷² The Declaration also introduced a list of "Free" goods.

Both categories of contraband were limited to goods destined for the enemy. The potential *use* of the goods defined the category. Absolute contraband included items exclusively for war use.⁷³ Conditional contraband included items susceptible to use in warfare but not exclusively for war use.⁷⁴ Food, money and fuel, for example, were listed as conditional contraband.

A belligerent was permitted additions to either the absolute or conditional contraband lists by notification to neutrals. However, a belligerent was limited by the use classification—that is, only items by nature exclusively for war use could be added to the absolute contraband list.⁷⁵ A list of free goods further reduced the scope of belligerent action.

The "Free List" was stated in two Articles of the Declaration. Article 28 listed principally raw materials and machinery used at the time for civilian end-products. Article 29 covered medical and hospital supplies for the care of the sick and wounded and articles and materials used on board the vessel. A belligerent could not place items from the free list on either the absolute or conditional contraband lists. Hospital ships and supplies aboard them were not mentioned in the Declaration because covered by Hague Convention VIII (1907).

The distinction maintained in the Declaration between absolute and conditional contraband was the basis for differing treatments of the categories in applying the "ultimate destination" doctrine. The burden of proof resting upon the belligerent also differed.

If goods on an intercepted vessel were absolute contraband, the goods could be "captured" (seized) ⁷⁶ if destined for *territory* belonging to or occupied by the enemy or if destined for enemy forces.⁷⁷ The goods could be seized although transshipment was to be through neutral territory.

⁷² The early history of contraband is developed in detail in Pyke, *The Law of Contraband of War*, 29–54 (1915). Shorter accounts may be found in *Naval War College, International Law Situations, 1933*, 2–5 and Colombos, *The International Law of the Sea*, 541–546, (3d Ed., 1954).

⁷³ See *Naval War College, International Law Topics, 1909*, 59 (Art. 22).

⁷⁴ *Ibid.*, 63 (Art. 24).

⁷⁵ *Ibid.*, 61 (Art. 23) ; 67 (Art. 25).

⁷⁶ The French version of the Declaration uses "saisissables." As pointed out by Smith, "capture" is inaccurate in this context because title does not pass until condemnation. See Smith, *The Law and Custom of The Sea*, 126 (3d Ed., 1959).

⁷⁷ *Naval War College, International Law Topics, 1909*, 75, Fn. 2, (Art. 30).

The ultimate destination doctrine was rejected for conditional contraband unless goods were shipped to a landlocked enemy.⁷⁸ Unless for a landlocked enemy, the goods could not be seized if to be discharged at a neutral port. The requirement of enemy *destination* as a basis for seizure was retained.

Conditional contraband, not to be discharged at a neutral port, could be seized if for the use of the enemy armed forces. If not to be discharged at a neutral port, the goods could be seized if for the use of an enemy government department and also for war use, except for bullion, gold and silver coin and paper money for which no special use had to be shown.⁷⁹

As to both absolute and conditional contraband, the ship's papers were conclusive proof of her voyage, absent an unexplained deviation from her route.⁸⁰ Since the burden of proof of ultimate destination (for absolute contraband) or the specific enemy destination (for conditional contraband) rested upon the belligerent, the evidential weight ascribed by the Declaration to ship's papers created a substantial obstacle to seizures and condemnations.

For absolute contraband, the belligerent had the benefit of a *conclusive* presumption of ultimate hostile destination if the goods were documented to be discharged at an enemy port, if the vessel was to call at enemy ports only, or if the vessel was to touch at an enemy port or join enemy forces before touching a neutral port.⁸¹ Although the belligerent might prove hostile destination without the benefit of these presumptions, this would be difficult without a highly effective system of economic intelligence producing information of a nature which could be disclosed in judicial proceedings.

For conditional contraband, a rebuttable presumption could be raised in two situations that the goods were destined for the enemy armed forces or an enemy governmental department.⁸² If the consignment was addressed to enemy authorities or to a merchant established in an enemy country and known to supply the enemy, a presumption of the specific hostile destination was raised—probably that the use was either for the armed forces or an enemy governmental department. If the consignment was addressed to an enemy fortified place or some other base for his armed forces, the presumption apparently was that the goods were for use of the armed forces.

Unless these presumptions were raised the destination was pre-

⁷⁸ *Ibid.*, 85 (Art. 35). Specific use of the armed forces or a governmental department of the landlocked enemy was necessary for seizure.

⁷⁹ *Ibid.*, 79 (Art. 33) ; 65 (Art. 24(4)).

⁸⁰ *Ibid.*, 77 (Art. 32) ; 85 (Art. 35).

⁸¹ *Ibid.*, 75 (Art. 31).

⁸² *Ibid.*, 83 (Art. 34).

sumed innocent. As with absolute contraband, the belligerent might produce other evidence to rebut the presumption of innocence.

Except for conditional contraband documented to be unladen at a neutral port when not for the use of the armed forces or a governmental department of a landlocked enemy, either conditional or absolute contraband could be seized on the high seas or in the territorial waters of belligerents at any point in the voyage of the transporting vessel.⁸³ The vessel might or might not be seized.

If the contraband cargo, by value, weight, volume and freight, was half or less of the cargo, the vessel might not be seized if the master was ready to deliver the contraband to the belligerent ship.⁸⁴ Circumstances might preclude this delivery. If the contraband could not be destroyed under the supervision of the belligerent, the vessel would be seized but not ultimately condemned.

Apart from the rule based upon the proportion of contraband to the whole cargo, whether a seized vessel was condemned depended upon her knowledge of the state of hostilities and the contraband declaration.⁸⁵ A vessel was deemed aware of hostilities if she left an enemy port after hostilities opened. She was also deemed aware of a state of war or a contraband declaration if she left a neutral port a sufficient time after notification of hostilities or of a contraband declaration to the port power.

If the vessel was ignorant of hostilities and the contraband declaration, the contraband could be preempted but not confiscated.⁸⁶ The vessel and noncontraband cargo were not condemned. The rule permitting delivery of small amounts of cargo without seizure of the vessel applied to these vessels as well as to vessels knowing of hostilities.

There was no permanent "contamination" of a vessel due to previous carriages of contraband.⁸⁷ Such a vessel could not be seized after its contraband had been discharged. However, contraband carried on a vessel infected noncontraband under the same ownership, rendering the noncontraband subject to condemnation.⁸⁸

Prior to the Declaration of London, major disputes between belligerents and neutrals tended to focus upon two issues. The first concerned items which should be listed as contraband and items which should not be listed. The second concerned treatment of goods

⁸³ *Ibid.*, 89 (Art. 37).

⁸⁴ *Ibid.*, 89 (Art. 40).

⁸⁵ *Ibid.*, 93 (Art. 43).

⁸⁶ *Ibid.*, The Declaration states "not * * * condemned except with indemnity."

⁸⁷ *Ibid.*, 89 (Art. 38).

⁸⁸ *Ibid.*, 93 (Art. 42).

and transporting vessels in which the goods were shipped to neutral territory. On some points belligerents and neutrals agreed.

Contraband enforcement was understood as a belligerent act, an act of war in the sense of warfare in its 19th and early 20th century forms. Without belligerency there was no contraband.⁸⁹

There was agreement that contraband related to property owned by neutrals. A different regime applied to enemy property at sea.⁹⁰ How ownership should be determined was disputed.

All agreed weapons and military equipment should be contraband. Beyond this there was dissent. As stated by Wheaton in 1815:⁹¹

The almost unanimous authority of elementary writers, of the ordinances of belligerent powers, and of treaties, agrees to enumerate among these * * * /contraband of war/ * * * all warlike instruments, or materials by their own nature fit to be used in war. But beyond this enumeration, there is some difficulty in reconciling the different authorities, which are extremely discordant and at variance with reason and justice. * * *

All agreed that in proper cases contraband could be intercepted on the high seas and both contraband and the vessel carrying it could be seized. The belligerent was conceded to have the initiative in this matter since the belligerent could establish contraband lists.

The two World Wars reinforced basic understandings antedating the Declaration of London. But these wars also indicated the contraband listings in the Declaration could not remain firm nor could a distinction in practice be made between absolute and conditional contraband in modern general military conflict.

World Wars I and II and the Declaration of London: Contraband Features

As previously described in this Chapter,⁹² contraband principles and procedures of the Declaration of London were applied in limited conflicts prior to World War I. But World Wars I and II revealed the irrelevance to modern general military conflict of some of the postulates of the Declaration and the inadequacy of the contraband procedures deemed appropriate by the 1908 Conference.

The two global conflicts demonstrated unequivocally the range of resources and diversity of goods required to support modern general

⁸⁹ See *Le Comte de Thomar*, I Pistoye and Duverdy, *Traite des Prises Maritimes*, 390 (1855). Discussed in Chapter IV, B., *Situation 6*.

⁹⁰ Contraband can relate to enemy property. For example, under Art. 2 of the Declaration of Paris the neutral flag covers enemy goods except contraband of war.

⁹¹ Wheaton, *The Law of Maritime Captures and Prizes*, 175 (1815).

⁹² See subdivision A (1), *supra.*, 653–662.

military operations. Demonstrated also was the high degree of governmental control required over the internal economy of a combatant state to permit its resources to be fully mobilized. New resources required for war rendered the contraband lists of the Declaration useless. New controls by combatant governments over private resources needed for war revealed as totally anachronistic the features of proof thought important by the London Conference for the hostile destination of conditional contraband.

The institutions for modern contraband control were developed by the Allies in World War I. The same institutions were used in World War II, although in this second global conflict, contraband control measures were refined and more comprehensively and ruthlessly applied than in the first.

In 1916, the Allies abandoned the Declaration of London as a legal guideline in economic warfare.⁹³ Article 40 concerning the proportion contraband must bear to the total cargo to permit condemnation of the vessel was expressly retained. With the relics of the Declaration thus put to rest, and their memory scarcely honored by mention during World War II,⁹⁴ the Allies turned to economic warfare as a secondary policy device in its modern form in general war.

In both wars, suspected vessels were diverted to contraband control stations for examination. Their papers and cargo were there carefully examined, use being made of the extensive intelligence often available. In England, these examiners were under close administrative control. A Contraband Committee in London, during World War II an interdepartmental committee of the Ministry of Economic Warfare, determined which cargoes and vessels should be released and which should be placed in custody of the Marshal of the Prize Court.

Developments in sea warfare—surface, subsurface and air—discouraged traditional visit and searches at sea except in areas remote from intensive combat operations. Unacceptable hazards were posed by exposure of the belligerent vessel and the vessel visited to submarine or air attack.

Naval forces were required to protect commerce, support troop movements and cover landing operations. Strict economy had to be practiced in deploying Allied naval units for control of possibly hostile sea traffic. German naval strength was devoted to interdicting sea commerce by destruction. This, coupled with destruction

⁹³ Order-in-Council, 7 July 1916, 110 *Brit. & F. St. P.*, 236 (1916).

⁹⁴ See Parl. Papers, Japan No. 1 /1940/ (*Asama Maru*) ; *The Sidi Ifni*, /1945/ L1.P.C. (2d) 200, 204, *Ann. Digest* (1943-45), 549, 552, Case No. 197.

of commerce in Allied operational zones in European waters and the Mediterranean, eliminated much commerce which Allied naval units might otherwise have been called upon to divert.⁹⁵

The amount and diversity of cargo on an average freighter, many times the tonnage of small craft involved in the Napoleonic war cases of Lord Stowell, rendered sea examinations of cargo perfunctory and useless in any event. Documentation of the cargo could be misleading. Business subterfuges for carrying contraband were familiar in World War I and increased in sophistication and generality of use in World War II. The papers of a ship could not be relied upon to indicate her destination.

Information needed to determine the necessity for seizure of ships and cargoes was obtained from sources other than the ships themselves. This information could not be communicated in meaningful form to naval officers enforcing contraband regulations at sea.

Land transportation improvements in neutral territory adjacent to that of the adversary significantly complicated interrupting the flow of the adversary's supplies. The problem was complicated enough during World War I due to the improved rail transportation in Europe. After the fall of France in 1940 and Italy's entrance into the war as an Axis partner, German hegemony on the continent reduced the effectiveness of naval operations as the primary instrument to interrupt commerce. At the same time elimination of many "adjacent" neutrals somewhat simplified and encouraged centralization of nonnaval administrative controls over contraband.

The reach of these highly centralized administrative institutions was extended to the source from which contraband was derived. Naval units were relegated to the mundane tasks of enforcing diversions of ships to contraband control points.

During World War II, aircraft were brought within the British Prize Act and could be diverted.⁹⁶ Aircraft as well as surface craft could be used to force diversions. But even this form of naval activity in economic warfare gradually diminished as the war progressed.⁹⁷

Navicerting

The inconvenience to neutrals of diversions during both wars was reduced by navicerting. Navicerting began in 1916, but was not used

⁹⁵ See Fitzmaurice, "Some Aspects of Modern Contraband Controls and the Law of Prize," 22 *Brit. Y. B. Int. L.*, 73, 74, Fn. 3 (1945).

⁹⁶ 2 & 3 Geo. 6, c. 65 (1939).

⁹⁷ Diversions upon reasonable suspicion were sustained by the Prize Courts. E.g., *The Mim* (1947), 115. And see *Discussion: Special Situation 7 C*, *infra.*, 788-824.

extensively in World War I.⁹⁸ During World War II, until the fall of France in 1940, the Allies used a "voluntary" form of navicerting.

In order to avoid extended detentions of vessels diverted to contraband control ports or voluntarily entering, the British first experimented with "holdback" guarantees. The ship was allowed to proceed to a neutral port after giving a guarantee not to deliver goods being considered by the Contraband Committee to the consignee and to return these goods to an Allied port if the Contraband Committee decided on seizure.

There were complications to this arrangement. If the Committee directed return of the goods, they might subsequently be released by the Prize Court after having been exposed unnecessarily to war-time sea transit. An even greater difficulty was the unwillingness of neutral port authorities to release the goods for return. The local export licensing system or other devices might be used to block the goods. The holdback guarantee system was a concession to neutral shippers which tended to weaken contraband control.

By the navicert system commenced in December 1939 (the "voluntary" system) two basic navicert forms were issued, Ship Navicerts and Cargo Navicerts. The master of the ship or his agent could obtain a ship navicert if the entire cargo was navicerted. There were variations in cargo navicerts.

A "Z" navicert, used only under the voluntary system, was issued by the British or French representative in the country in which the application was sought on his own responsibility. Referred List Navicerts could be issued only after instructions from the Ministry of Economic Warfare. The Referred List covered major items of contraband normally exported by the neutral country concerned.⁹⁹

If a ship sailed with a ship navicert, she usually would be cleared at sea by British or French patrols by identification and without diversion. If a ship sailed without a ship navicert, but with fully navicerted cargo, she might be cleared at sea only if circumstances permitted a visit and she had no mail or passengers. Otherwise, she would be diverted to a contraband control base. Seldom would she

⁹⁸ See Ritchie, *The Navicert System During the World War* (1938). Navicerting is a refinement of the older technique of "ship's passes" mentioned in the Reprisals Order-in-Council, 1915, to be received by vessels diverted from German to neutral ports. A good brief description of World War I contraband control methods can be found in Ritchie, 1-4 and in Salter, *Allied Shipping Controls*, 98-116 (1921).

⁹⁹ "Mewcerts" were briefly issued for cargo coming from Egypt without references to the Ministry of Economic Warfare. These were discontinued in January 1940.

be detained at the base for a long period unless some of her cargo navicerts had been revoked or destination of the cargo was suspect.

Neither the ship navicert nor the cargo navicerts were guarantees against interception or seizure. Spot interceptions and diversions were required to check clandestine carriage of contraband in navicerted ships. A neutral destination might become hostile. A delay might occur between the time the navicert issued and the shipment, additional facts coming to the attention of the belligerent in the meantime.

But possession of ship and cargo navicerts was a great convenience to merchants. Shipowners, desiring ship navicerts, refused to carry unnavicerted cargo. Owners of navicerted cargo would not employ a ship which could not obtain a ship navicert.

The voluntary system was first used between the United States and certain neutral European countries and thereafter extended to other neutrals. In the summer of 1940, it was used by practically all shippers not engaged in carrying contraband.

While the voluntary system had been supplemented by over sixty agreements with neutral companies—shipping companies, importers and exporters—in which these companies agreed to use the navicert system when available, to refrain from buying from or selling to the enemy, to obtain guarantees of neutral consumption from purchasers, and to undertake similar projects supporting the economic warfare program, it was decided by the British in 1940 to extend the navicert system and place it on a semicompulsory basis.

This was done by a "Reprisals" Order-in-Council on 31 July 1940.¹⁰⁰ Both Ship and Cargo Navicerts were issued. By the terms of the Order an unnavicerted ship or cargo was subject to seizure. A rebuttable presumption was raised that the ship or cargo, as the case might be, had a hostile destination.

Although vessels and cargoes were seized for the absence of navicerts, in no case was a vessel or cargo condemned solely on the strength of the rebuttable presumption of enemy destination. If the Court condemned the vessel or cargo, other factors creating suspicion were always present.¹⁰¹

¹⁰⁰ S. R. & O., 1940, No. 1436.

¹⁰¹ *The Monte Contes*, /1943/ A.C. 6; *The Sidi Ifni*, /1945/ L.I.P.C. (2d) 200, *Ann. Dig.* (1944-45), 549, Case No. 197. In *The Ole Wegger*, *Ann. Dig.* (1943-45) the German Prize Court held Norwegian whaling vessels in possession of British ship warrants assisting and facilitating the military and economic conduct of warfare by the British and thus guilty of "unneutral service." On the issues presented in "unneutral service" see II Oppenheim, *International Law*, 831-846 (7th Ed., 1952); Colombos, *International Law of the Sea*, 564-576 (3d Ed., 1954); Smith, *The Law and Custom of the Sea*, 131-137 (3d Ed.,

Coupled with the semicompulsory navicert system was a system of "Ship Warrants" supplying a sanction for navicerting. A ship warrant, issued to the owner of a neutral ship, guaranteed the ship access to British controlled shipping facilities. These included bunkers, stores, dry docking, insurance and credit.

In return, the owner agreed to comply with economic warfare regulations, including a commitment not to sail to or from navicert areas without a ship navicert. Effectiveness of the ship warrant as a sanction was diminished by British inability to control resort by shipowners to other sources for services as for example bunkering facilities and credit controlled by the United States and other neutrals. The sanction was strengthened when the United States entered the war.

The ship warrant system functioned properly only when combined with navicerting. For this reason it was not particularly effective in the Pacific before Japanese entry into the war, there being no adequate administrative machinery in the Pacific area for navicerting ships and cargoes.

After United States entry into World War II, the British continued control of the navicert system. The United States, in lieu of navicerts, licensed its own exports. Imperial Export Licensing

1959). The Declaration of London, 1909, contained provisions on "unneutral service" in Articles 45-47.

Legal problems in "unneutral service" tend to be peripheral to the conduct of economic warfare, yet are sometimes involved directly, as in Captain Wilke's interception of *Trent*, discussed in Chapter I. Personnel instructed to engage in economic warfare were removed from *Trent*.

A vessel or aircraft may "assume enemy character," that is, operate under *de facto* enemy control. Assumption of enemy character is considered in *Special Situation 7 D, infra*. A vessel or aircraft may also give "*unneutral assistance*" to the enemy. This may become a significant economic warfare problem in large-scale carriages of contraband or enemy property. The unneutral activity may be a minor feature in the entire voyage or flight. The latter is often described as "unneutral service."

The consequences of "unneutral service" may vary from a warning to seizure of the vessel or aircraft and confiscation to the cargo. Factors considered in evaluation "unneutral service" are: (1) The degree to which the unneutral conduct is likely to enhance the military capabilities of the enemy. (2) The nature of the contraband goods, the character and status of prohibited passengers, and the nature and volume of prohibited information collected and transmitted. (3) The degree to which the vessel or aircraft apparently is subject to enemy control. (4) The proportion which the unneutral activity bears to the total activity on the voyage or flight of the unit. (5) The extent to which the unneutral conduct apparently is known to the owners and operators of the unit.

in Commonwealth countries was accepted as equivalent to cargo navicerting for the issue of ship navicerts.¹⁰²

Although British semicompulsory navicerting was initiated by a Reprisals Order-in-Council, its basic feature was nothing more than a play on the older technique of ship's passes. If the belligerent could seize contraband, certainly the belligerent could waive this right in its discretion by issuing navicerts. The burden of proof feature, as one writer aptly commented,¹⁰³ is simply a matter of municipal prize court procedure. So long as neutrals have adequate notice of the change, and a hearing is afforded, the burden of proof should be in the discretion of local authorities. Placing the burden on the claimant, during periods when many seizures are made, is simple administrative common sense.

The navicert order of 1940 may have been framed as a reprisal to apply it to goods not subject to seizure as contraband or enemy property. The expansion of contraband lists, however, had left little property in either category.

An extension of contraband controls to property not subject to seizure may have an inherent virtue of administrative convenience. Nevertheless, a Board of Economic Warfare should not dissipate its energies by denying navicerts to innocent trade when time could be expended with greater advantage in interdicting trade of interest to the enemy. The injured owner of an innocent cargo or ship during World War II had little redress in any event other than recovery of his property seized under the Reprisals order. There were no damages for wrongful seizure or diversion.¹⁰⁴

Expansion of Contraband Lists

Practice in the two world wars preserved in all essentials the basic features of contraband. Contraband goods must be of a nature which will in some way further the enemy war efforts. The goods must also have a hostile destination.

However, the Declaration of London contraband lists were quickly abandoned by the Allies and Central Powers in World War I. New lists ultimately included virtually all goods of possible use in war

¹⁰² A comprehensive account of World War II navicerting procedures is to be found in I Medlicott, *The Economic Blockade*, 94-105, 343-350, 436-448 (1952); II Medlicott, *The Economic Blockade*, 153-159, 420-427 (1959).

¹⁰³ Rowson, "Prize Law During the Second World War," 24 *Brit. Y.B. Int. L.*, 160, 196-197 (1947).

¹⁰⁴ See Fitzmaurice, "Some Aspects of Modern Contraband Control and the Law of Prize," 22 *Brit. Y.B. Int. L.*, 73, 88-89 (1945).

except medical and hospital supplies, luxury items in a limited category and supplies used on board ship.¹⁰⁵

England and France commenced World War II with a short contraband list, issued in 1939 and based on the United States 1917 Naval Instructions for Maritime Warfare. This list contained four categories of absolute contraband: (1) arms, ammunition, explosives and chemicals; (2) fuel and means of transportation; (3) means of communication; and (4) coin, bullion, currency and evidences of debt. Food, foodstuffs and clothing were conditional contraband.¹⁰⁶

Some of the combatants in World War II continued detailed lists—but all ultimately had lists as broad or broader in coverage than those in World War I. This expansion of contraband was a highly conventional and legally unassailable reaction to the all embracing economic demands of modern war.

As the contraband lists were expanded, certain earlier problems which vexed merchants and publicists began to disappear. One was the doctrine of infection, covered by Article 42 of the Declaration of London and much discussed by prize courts and writers in the 18th and 19th centuries. All of the cargo of the owner on board ship was likely to be contraband. Thus there was nothing to infect—all of it suffering the same malady.

The second and third provisions of the Declaration of Paris, 1856, became obsolete. Contraband goods were excepted from the immunity granted enemy goods under a neutral flag and neutral goods under an enemy flag—yet most goods were contraband under modern lists.

The special enemy destination, expressed in Article 25 of the Declaration of London as a condition for seizure and condemnation of conditional contraband, was eliminated as a contraband feature by judicial recognition of governmental economic controls. With elimination of special enemy destination for seizure and condemnation of conditional contraband; and extension also of the ultimate destination principle to conditional contraband—discussed in *Special Situation 7 C*; the importance of distinguishing between contraband categories diminished.

During World War I, Sir Samuel Evans, in *The Kim*,¹⁰⁷ recognized a presumption that all conditional contraband with a hostile destination was either for enemy military forces or for the government of the adversary for war use. This presumption was based

¹⁰⁵ See *Naval War College, International Law Documents, 1944-45*, 34-42.

¹⁰⁶ VII Hackworth, *Digest*, 24-26 (1943).

¹⁰⁷ /1915/, 215, 280-282.

upon the control exercised by combatants over private property for war ends by requisitioning and other devices.

The feature of increasing governmental control over its internal economy for war purposes and the relation of this feature to contraband control had been observed during the Napoleonic wars.¹⁰⁸ These facts of wartime governmental control were regularly relied upon by the German Prize Courts.¹⁰⁹ The presumption was continued in prize proceedings in World War II;¹¹⁰ and has been stressed in recent prize cases.¹¹¹

Despite changes in presumptions concerning the special enemy destination of conditional contraband, thereby shifting to the claimant the burden of showing an inoffensive destination, there still may be reason for a tenuous distinction between the categories. There is a suggestion, for example, in British prize practice during World War II, that a distinction may be made if property is shipped before hostilities commence. If the contraband is conditional, a mere diversion of the goods before seizure may save them from condemnation.¹¹² But if the contraband is absolute, not only a diversion of the cargo but abandonment of the original intention of hostile destination by objective acts is required.¹¹³

There is also propaganda value in a conditional contraband list when items other than those solely of military application are to be

¹⁰⁸ E.g., VII Moore, *Digest*, 676-677 (1906) (Hammond, British Minister to Jefferson, Secretary of State, 1793).

¹⁰⁹ E.g., *The Maria*, 10 A.J.I.L., 927 (Imperial Supreme Prize Court, 1915); See Richards, "Contraband," 3 *Brit. Y.B. Int. L.*, 1, 9-10, (1922-23).

¹¹⁰ *The Alwaki*, /1940/, 215, 218; *The Monte Contes*, /1944/ A.C. 6; *The Sidi Ifni*, /1945/ L1.P.C. (2d) 200, *Ann. Dig.* (1943-45), 549, Case No. 197; *The Nailsea Court*, *Ann. Dig.* (1946) (Conseil des Prises, 1946), 425, Case No. 182. See Rowson, "Prize Law During the Second World War," 24 *Brit. Y.B. Int. L.*, 160, 189 (1947).

¹¹¹ See *The Fedala*, *Int. L. Rep.* (1957), 992; and in *Annual Digest* (1949) *The Klipfontein* (Case 210); *The Bataan* (Case 211); *The Frankisky* (No. 1) (Case 212); *The Triport* (Case 214) (all by Prize Court of Alexandria, Egypt).

¹¹² *The Glenroy* (Cargo ex.) (No. 2), /1943/ L1.P.C. (2d) 153. However, the goods were condemned on appeal as tainted with enemy ownership under the principle of *The Anglo-Mexican*, /1918/ A.C. 422. See *Part Cargo ex.M.V. Glenroy*, /1945/ A.C. 124.

¹¹³ *The Charles Racine*, /1944/ L1.P.C. (2d) 177. On appeal /1946/ L1.P.C. (2d) 215, *Ann. Dig.* (1946) 414, Case No. 179. See *The Gabbiano*, /1940/ 166, 168 (absolute contraband—voluntary diversion). Cf. *The Twee Ambt*, /1920/, 413 (unexecuted intent of master to run for enemy port not basis for condemnation). A possible solution may be preemption of the goods—compensating the owner. E.g., *The Sorfareren*, /1915/ 1 B. and C.P.C. 580; *The Selandia*, *Ann. Dig.* (1938-40), 571, Case No. 218 (South Africa, Supreme Prize Court, 1940).

interdicted. Intercepting shipments of food and clothing has stimulated much antagonism among neutrals in the past. The food or clothing supply of a neutral may be constricted; producers or vendors of food in neutral food exporting states may be injured; the civilian population of the enemy may be starved or frozen to the dismay of neutral beholders. Placing food and clothing on a conditional contraband list suggests the belligerent is sensitive to humanitarian dictates even though in practice food is treated as absolute contraband.

Food as Contraband

The general population growth, coupled in many areas with natural limits upon agricultural production by current methods, will make belligerent operations against an adversary's food supply probable features of future general and limited wars.

These operations may involve the use of chemical or biological weapons against plants or domestic animals.¹¹⁴ The use of rice blast against the Japanese crop was considered in World War II but rejected.¹¹⁵ Chemical agents have been used against insurgent food crops in South Vietnam.

Operations can also be expected against the food supply of an adversary by interdicting its transportation, although the circumstances of a particular conflict, such as that described in *General Situation 7* may make interdiction of food transport undesirable. The British philosophy during World War II was summed up by Sir Winston Churchill:¹¹⁶

* * * Let Hitler bear his responsibilities to the full, and let the people of Europe who groan beneath his yoke aid in every way the coming of the day when that yoke will be broken. Meanwhile, we can, and we will, arrange in advance for the speedy entry of food into any part of the enslaved area when this part has been wholly cleared of German forces and has genuinely regained its freedom. We shall do our best to encourage the building up of reserves of food all over the world so that there will always be held up before the eyes of the peoples of Europe—including—I say it deliberately—the German and Austrian peoples, the certainty that the shattering of

¹¹⁴ See Rothschild, *Tomorrow's Weapons*, 121–131 (1964) for toxins useful in antifeed warfare. As to legal problems, see Neinast, "United States Use of Biological Warfare" 24 *Mil. L. Rev.*, 1 (1964); Brungs, "The Status of Biological Warfare in International Law," 24 *Mil. L. Rev.*, 47 (1964).

¹¹⁵ Leahy, *I Was There*, 439–440 (1950).

¹¹⁶ See I Medlicott, *The Economic Blockade*, 666, App. II (1952) (Churchill statement on Relief to House of Commons, 20 August 1940).

the Nazi power will bring to them all immediate food, freedom and peace.

Interdicting the enemy food supply will weaken his labor force. Automation may offset this to a degree but is unlikely to develop as effective defense. Hardships suffered on the home front directly affect the morale of troops. This can be reduced to a degree but not precluded by censorship.

Denials of food can influence the deployment of enemy troops. This was clearly demonstrated during World War I. During World War I, the German government abysmally mismanaged its food resources. It failed to prevent "holdbacks" by local producers, withdrew excessive agricultural labor for the armed forces, failed to build up a sufficient stockpile of chemical fertilizers, and diverted an exorbitant amount of food into military supply channels.

By 1915, Germany had been brought internally to the brink of chaos by Allied contraband controls. When Romania entered the war in 1916, Germany was thus forced to invade that country promptly to secure the Romanian wheat supply. Even so, she almost collapsed during the winter of 1916-17.

Sir Arthur Salter states:¹¹⁷

* * * In what precise proportions privations at home and defeat in the field contributed to the acceptance of the Armistice cannot be stated. But the blockade may justly claim to have shortened if not to have won the war. It succeeded at the moment when the counterblockade by submarine had just definitely failed. * * *

Nazi Germany profited by the earlier experience. Although in 1938 she was estimated to have food stocks on hand for only a few months of hostilities, by April 1939 she had stockpiled approximately a year of her "peacetime" needs.

Germany was then importing about 11% of her annual calory requirements. It was possible she could overrun other sources of supply, as in fact she did. This would reduce the additional imports of food required to sustain the country on a war level.

During the early months of World War II, adjacent neutrals, even major food producers, such as Holland, Denmark and Belgium, were importing food much in excess of their probable consumption. While contraband controls upon food and other supplies were enforced by the Allies, the problem was also attacked by War Trade Agreements with the Northern Neutrals, Belgium, Holland and Switzerland. These countries could be persuaded to control their exports to Germany to some extent in return for British and

¹¹⁷ Salter, *Allied Shipping Control*, 102 (1921).

French liberalization of contraband controls and their export control policies. These agreements were compromises and the flow of foodstuffs and other commodities to the enemy did not stop.

After the fall of France, and elimination of many of the neutrals, agitation increased for liberalization of the contraband policy to permit food and clothing to reach these "captured" populations. President Hoover has stated the cause for relief of the victims of Nazi aggression quite ably.¹¹⁸ The reasons for opposition to relief of those engaged in economic warfare have been expressed with equal force.¹¹⁹

A Commission for Polish Relief had been organized in the United States in September 1939 and permits were obtained from the Chamberlain government for relief shipments of food. Relief was also sent to Finland during the Russo-Finnish War. But when Churchill became Prime Minister, exceptions for food shipments ceased.

In November 1940, the National Committee on Food for the Small Democracies was created with Hoover as Honorary Chairman. Around this Committee developed much of the pressure for relaxation of contraband regulations to permit aid to the occupied countries and also to unoccupied Vichy France.

This pressure, although ineffectual in achieving its aim, embarrassed British blockading efforts at a critical war period. The Ministry of Economic Warfare was placed on the defensive.

The British position was that of the "man under the gun" who resists any aid to his immediate adversary—direct or indirect. The position of American relief agencies stemmed from genuine humanitarian impulse, although there were no doubt some minor political ramifications and perhaps an element of profit motive as Professor Medlicott discreetly suggests.¹²⁰

The important point which the British difficulty demonstrated is that the state interdicting food as contraband must anticipate emotional reactions among neutrals. These reactions can jeopardize the belligerent's entire system of contraband control. This hazard should be balanced against the advantages to the belligerent derived from interdicting food.

That food currently can be declared contraband of war is no

¹¹⁸ IV Hoover, *An American Epic (The Guns Cease Killing and the Saving of Life From Famine Begins, 1939-1963)*, *passim* (1964).

¹¹⁹ See Gordon and Dangerfield, *The Hidden Weapon*, 132-137; I Medlicott, *The Economic Blockade*, 549-584 (1952); II Medlicott, *The Economic Blockade*, 612-619 (1959).

¹²⁰ I Medlicott, *The Economic Blockade*, 553, 554, 555 (1952).

longer seriously contested.¹²¹ So far as its interdiction is concerned, whether food is conditional or absolute contraband today makes no practical difference. Prize courts have regularly condemned food supplies even though listed as conditional contraband in view of the requisitioning and other control practices of combatant governments.¹²²

It is speculative whether Article 23 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War¹²³ will affect significantly belligerent contraband food operations. Contracting parties are to allow free passage of all essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

This obligation, however, is conditioned, fatally it appears, upon satisfaction of the party there is no serious ground for fearing: (a) the consignments may be diverted from their destination; or (b) the control may not be effective; or (c) a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

Furthermore, the Power allowing passage may make distribution conditional upon supervision of the Protecting Power. It can also prescribe the technical arrangements under which such passage is allowed.

Medical and Hospital Supplies

Apart from Article 29 of the Declaration of London, 1909, and Article 23 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,¹²⁴ there is little guidance concerning the status of medical and hospital supplies as contraband. These have not appeared on absolute or conditional contraband lists and a practice is believed to exist to exclude them on humanitarian grounds.

Article 29 of the Declaration of London permitted, if the military

¹²¹ Oppenheim states it is generally agreed that foodstuffs should not under ordinary circumstances be declared contraband. He does not state what extraordinary circumstances are unless he has in mind food destined for the use of the enemy army or navy. II Oppenheim, *International Law*, 805 (7th Ed. Lauterpacht, 1952). See III Hyde, *International Law*, 2108-2123 (1947).

¹²² E.g., *The Sidi Ifni*, /1945/ L.I.P.C. (2d) 200, *Ann. Dig.* (1944-45), 549, Case No. 197.

¹²³ 6 U.S.T. 3516; *TIAS* 3365. See *Naval War College, International Law Documents, 1950-51*, 175.

¹²⁴ *Ibid.*

situation was urgent, requisition of these supplies if destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy. This is currently the international custom.

Provisions of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 1949, applicable to hospital ships, in relation to blockades as previously discussed, should also apply to the enforcement of contraband regulations.¹²⁵ Individual shipments of medical supplies to prisoners of war probably should be passed without seizure.¹²⁶

Article 23 of the Geneva Convention Relative to the Protection of Civilian Persons provides for the free passage of medical and hospital stores intended for the civilians of another high contracting party, including civilians of the adversary. But this passage is subjected to the identical conditions imposed upon the passage of essential foodstuffs.

The Need for a Contraband List

The trend to shorten contraband lists in World War II, stating general contraband categories rather than attempting encyclopedic listings of specific items, worked adequately when coupled with an efficient navicert system. The items considered contraband by the belligerents seldom were placed in transit because no carrier could be obtained for unnavicerted cargo.

The major function performed by the short list was guidance to administrators issuing navicerts. The function of notice to shippers who might unsuspectingly send their property to sea, and there have it seized, was of secondary importance.

It was, of course, important to shippers to know that a program of contraband control was in force. If a shipper applied for a navicert and could not obtain it, he was on notice that his shipment at least was suspect, although as noted previously, absence of a navicert was never the sole ground of condemnation in a prize case.¹²⁷

¹²⁵ See Fn. 56, *supra*; *Naval War College, International Law Documents, 1950-51*, 109.

¹²⁶ Geneva Convention Relative to the Treatment of Prisoners of War, 1949, Art. 72. (The provision is directed specifically to the Detaining Power but might be applied to a third power enforcing contraband regulations against the Detaining Power.) See *Naval War College, International Law Documents, 1950-51*, 140.

¹²⁷ See Fn. 100, *supra*. In *The Mount Taurus, Ann. Dig.* (1946), 427, Case No. 183, the French Conseil des Prises indicated previous British denials of navicerts to companies did not make all cargo shipped by those companies suspect. (See *In the Matter of Ten Registered Letters ex Eastbound Aircraft*,

Sir Daniel Somervell, Attorney General, is said to have suggested during his argument in *The Jurko Topic*¹²⁸ that it was unnecessary as a matter of law to publish contraband lists. He was taken to task for this by Mr. Rowson because the consequences of carriage of contraband might differ depending upon knowledge by the shipper of the proclamation of contraband and the contents of the proclamation.¹²⁹

During the American Civil War, the Union had no general contraband list other than the list issued by the Secretary of the Treasury to the Collectors of Customs and by the Secretary of State to Consular Representatives covering trade with southern ports (Beaufort, Port Royal and New Orleans) permitted by Proclamation in 1862.¹³⁰ All trade was to be interdicted with other southern ports by the blockade, although contraband controls were applied to shipments through Mexico.

A proclamation that contraband goods will be interdicted seems necessary, just as there must be notice of a blockade. Whether a statement of the goods to be interdicted also is required should depend upon several factors. If the goods interdicted are to be those traditionally treated as absolute contraband, i.e., goods suitable only for war use, there seems no purpose today in setting forth a list other than to coordinate the activities of administrative and naval personnel enforcing contraband regulations.

The more general the conflict, the greater the need there would seem for a list because of the increasing range of contraband control activity. If navicerting is used generally, this should reduce the need for a contraband list published generally for the benefit of neutrals, although guidelines must be established for the administrative officers issuing navicerts.

Suggested Solution: Special Situation 7 B

The Advisory Defense Committee should prepare a contraband list both for guidance of nonparticipants in the enforcement action and for guidance of the nationally diverse American naval units which will participate in enforcing the contraband regulations. No navicerting scheme seems justified unless the action promises to be

Ann. Dig. (1949), 583, 585 (Bermuda, Supreme Court in Prize) where the court discussed notice implied from the mere setting up of censorship of postal correspondence.)

¹²⁸ /1941/ L1.P.C. (2d) 89, *Ann. Dig.* (1941-42), 631, Case No. 178.

¹²⁹ Rowson, "Prize Law During the Second World War," 24 *Brit. Y.B. Int. L.*, 160, 188, Fn. 9 (1947).

¹³⁰ See Savage, *Policy of the United States Towards Maritime Commerce in War 1776-1914*, 446-449 (1934).

of extended duration. Thus, a list seems vital for the guidance of shippers and to reduce the burden upon intercepting naval units.

The items listed as contraband should be limited to those: (1) immediately enhancing Nuevan and Antiokan military power; and (2) reasonably discoverable by a search at sea. Diversions of vessels for close examination should be minimized.

The industrial resources of Nueva and Antioka seem sparse. The emphasis in contraband control should thus be upon manufactured items such as weapons, uniforms, ammunition, communication equipment, and transportation which cannot be produced locally. In view of the past history of conflict between the United States and Nueva, biological and chemical munitions and means for their delivery should be listed.

The suggestion of the Antiokan Minister of Defense-in-Exile to include food, medical and hospital supplies on the contraband list should be rejected. The list should be coordinated with the restrictions of the blockade which now excludes these items from coverage.

Placing food on the contraband list risks mobilizing opinion against the Organization of American States. This might embarrass further action by the Organization as well as any similar action the Security Council might decide to take.

Denials of food will also injure the innocent populations of Nueva and Antioka against whom the action of the Organization is not aimed. These people, now possibly uncommitted, may be prejudiced in favor of the Salvaje regime by unduly harsh economic measures. If denials of food later become necessary, both the contraband program and the blockade can be expanded.

Medical and hospital supplies, in addition to their exclusion because of the exception permitting them to pass the blockade, should not be placed on the contraband list because customarily excluded for humanitarian reasons.

D. ULTIMATE DESTINATION (CONTINUOUS VOYAGE)— BLOCKADE AND CONTRABAND APPLICATIONS: CONSEQUENCES OF CARRIAGE OF CONTRABAND AND BREACH OF BLOCKADE

Special Situation 7 C

The Advisory Defense Committee of the Organization of American States accepted your suggestions tendered as a result of your study in *Special Situation 7 B*. This contraband list was prepared and approved by the Organ of Consultation:

1. Arms of all kinds; ballistic and guided missiles and launching equipment; ammunition, explosives, igniting devices; chemical, biological and nuclear munitions and devices for their use.

2. Electrical and electronic equipment.
3. Transportation, armored and unarmored, sea, land and air.
4. Lubricants. Fuels adaptable for military purposes without further processing.
5. Military clothing and equipment.
6. All manufactured components of and machinery for the manufacture or processing of articles on this list.

Naval units of the Organization are to limit contraband enforcement to waters of the Western Hemisphere. A further extension of enforcement activity may be made if required.

Surface sea traffic only will be intercepted. Submarines and aircraft will be intercepted by the blockading force.

Vessels seized are to be diverted to the nearest convenient port of a member of the Organization of American States at which a court having jurisdiction in prize is sitting.

In the opinion of the Advisory Defense Committee, strict enforcement of contraband regulations will minimize blockade running and will permit the blockade to be maintained by a few surface units with air support.

An OAS Economic Measures Command with United States naval personnel attached, is established at Miami. Admiral Albuquerque of Rio Oro, a member of the Organization of American States, is in command. You are on his staff.

The Captain of U.S.S. *Tattnall* has intercepted a Corinthian freighter, M.S. *Truant*, on the high seas within the Western Hemisphere bound for Georgetown, Guyana. Her papers appear in order. About $\frac{1}{8}$ of her total cargo consists of 20,000 waterproof ponchos made of tan material; 400 pounds of assorted red, brown, green and yellow oil paints suitable for camouflaging waterproof cloth; and 2,000 16mm paint brushes suitable for applying oil paint.

The ponchos, paint and brushes are consigned to *Rochambeau et fils* of Georgetown by Vulcan Metals Company of Parnassus, Corinthia. On an intelligence summary received by the Captain yesterday, he noted *Rochambeau et fils* sold eight tons of canned rations and 6,000 jungle boots to Salvaje approximately two weeks before the blockade mentioned in *General Situation 7* was established.

The Captain requests instructions whether he should divert *Truant* or permit her to continue to Georgetown. Instruct him.

Discussion: Special Situation 7 C

Ultimate Destination (Continuous Voyage): Background

The foundation cases for modern applications of "ultimate destina-

tion" to carriages of contraband and breaches of blockade are *The Peterhoff*¹³¹ and *The Springbok*,¹³² both arising from Union economic warfare at sea during the American Civil War, and both handed down by the United States Supreme Court on the same day. *The Bermuda*,¹³³ another case in which continuous voyage principles were discussed by the United States Supreme Court, also has been frequently cited in later prize decisions.

As mentioned in the *Discussion of Special Situation 7 A*, the Federal close blockade of Confederate ports was breached successfully by blockade runners. The Federals thus reinforced their close blockade by seizures of neutral vessels during their voyages between ports in Europe and neutral ports in the American area. It was not always clear whether these seizures were for carrying contraband, carrying enemy property, or for intended breach of blockade.

The Federal navy used a rudimentary blacklist of vessels engaged in transporting goods intended for the Confederacy. The names of firms and persons engaged in this trade also were generally known.

A ship carrying goods for the Confederacy might stop at a port in neutral territory convenient to a Confederate destination, bunker and refit if necessary, and then run the blockade. More often, the cargo was transshipped and either run by another vessel through the blockade or carried by land through Mexico to Confederate territory.

Peterhoff was seized near St. Thomas in the West Indies on a voyage from London to the mouth of the Rio Grande. Her cargo, part of which seemed principally for military use, was documented for Matamoras, Mexico. The cargo was to be lightered from the mouth of the Rio Grande to Matamoras.

The Supreme Court held the mouth of the Rio Grande not blockaded and *Peterhoff* not guilty of an attempted breach of blockade. The cargo, however, was condemned on evidence that part of it was to be transshipped from Matamoras to Brownsville, Texas, for Confederate use. While part of the route was by land, the contraband part of the cargo had a hostile destination. The remainder of the cargo was condemned on a theory of infection since owned by the owners of the contraband.¹³⁴

The same line of reasoning was applied to an attempted breach of blockade in *The Springbok*. *Springbok* was seized en route from

¹³¹ 72 U.S. (5 Wall.) 28 (1866).

¹³² 72 U.S. (5 Wall.) 1 (1866).

¹³³ 70 U.S. (3 Wall.) 514 (1865).

¹³⁴ *Frau Houwina*, II Sirey 795 (1855) (French Imperial Prize Court) was not cited. The ultimate destination rule was there applied to saltpeter seized on a neutral Hanoverian vessel bound from Lisbon to Hamburg, a notorious point of transshipment to Russia.

London to Nassau. Her papers were in order. Her cargo was packaged. Bills of lading were "to order or assigns" and disclosed the contents of approximately one third of the packages on board. Apart from eight swords and eleven bayonets, probably intended for use in Nassau, contraband items were blankets, buttons, boots and shoes.

Both *Springbok* and her cargo were condemned in the District Court. Rather than taking evidence to acquit or condemn in the first instance from the ship (her papers and testimony by her officers), as was then customary in prize procedure, the United States introduced evidence from *The Gertrude*¹³⁵ and *The Stephen Hart*.¹³⁶ *Gertrude*, seized while running the blockade, has been condemned about a month previously. *Stephen Hart* was then before the District Court.¹³⁷

On appeal, the Supreme Court restored *Springbok* under the rule of *The Bermuda*¹³⁸ because there was no evidence *Springbok* intended to breach blockade or that her owners had an interest in the cargo or knew its destination. But the entire cargo was condemned as shipped by its owners with an intent to breach the blockade.

The Supreme Court gave weight to the fact the bills of lading were silent both as to the owners and consignees of the property and the contents of many of the packages. This silence was considered suspicious since the cargo was shipped to a notorious resort for blockade runners.

A letter of instructions to the master, found on board, directed him to report to an agent of the charterers in Nassau "who will give you orders as to the delivery of your cargo." The property interest of the owners in the cargo apparently was to remain unchanged in Nassau. The contraband nature of part of the cargo was also thought to indicate a probable hostile destination.

Then using evidence developed in *Gertrude* and *Stephen Hart*, the Supreme Court confirmed its suspicions raised by evidence from *Springbok*. Packaging and markings on cargo found on *Gertrude* were similar to packaging and markings on cargo on *Springbok*. A charterer of *Springbok*, and part owner of her cargo, also owned *Gertrude*. *Gertrude* had been in Nassau at about the time *Springbok* was due to arrive. Claimants to the cargo of *Stephen Hart* (arms and ammunition) were also part owners of *Springbok's* cargo.

¹³⁵ VII Moore, *Digest*, 707n. (1906).

¹³⁶ *Ibid.*, 704. On appeal, *The Hart*, 70 U.S. (3 Wall.) 559 (1865).

¹³⁷ *Peterhoff*, *Springbok*, *Gertrude* and *Stephen Hart* were all before Judge Betts of the Southern District of New York.

¹³⁸ 70 U.S. (3 Wall.) 514 (1865).

Brokers for the cargo on *Stephen Hart* were also brokers and shippers of the cargo on *Springbok*.

Peterhoff and *Springbok* brought clearly into focus for the first time that the continuous voyage of the vessel was not necessarily the major offensive element in this phase of economic warfare. Instead, the ultimate destination of the cargo was the matter of principal concern. For enforcing contraband and blockade regulations, the cargo should be condemned even though it was trans-shipped.

Although the British government accepted ultimate destination as applied in both *Peterhoff* and *Springbok*, there was much criticism of *Springbok* by English and continental publicists. These critics objected to the concept of a blockade being breached other than by the ship herself. They also objected to condemnation of the cargo without some substantial suspicion first being raised by evidence from the vessel. Nevertheless, the use in *Springbok* of evidence from other ships provided an opening wedge for later general uses of intelligence obtained from any sources. This intelligence was used both for the initial seizure and for condemnation even though the ship's papers and other evidence aboard suggested no enemy destination.

Ultimate destination had been used in various naval contexts long before *Peterhoff*, *Springbok* and related American Civil War cases. Also, the basic technique had long been familiar in commercial and fiduciary law as tracing.

The term "continuous voyage" was used by Lord Stowell in 1805.¹³⁹ He then recognized the principle as long established.

Continuous voyage was applied by English courts to seizures under the "Rule of 1756."¹⁴⁰ The doctrine was also applied to carriage of contraband in the 18th century and to blockade in 1806.¹⁴¹ Features of the principle can be traced to the early 17th century.¹⁴² *Peterhoff*

¹³⁹ *The Maria*, 6 C. Rob. 201 (1805).

¹⁴⁰ England prohibited trade by neutrals between her adversaries (France and Spain) and their colonies under special licenses during war when France and Spain did not permit this trade in peace. Direct trade between the neutral and France or Spain was not prohibited. Neutrals sought to take advantage of this exception by circumnavigation—touching an intermediate neutral or British port. They were foiled by being seized on the last leg of this journey, between the intermediate port and France or Spain, under the "continuous voyage" doctrine.

¹⁴¹ *The Jesus*, Burrell 164, 167 Eng. Rep. 521 (1761) (Contraband); *The Charlotte Sophia*, 6 C. Rob. 204n. (1806) (Blockade).

¹⁴² See Briggs, *The Doctrine of Continuous Voyage*, 11–40 (1926); Gantenbein, *The Doctrine of Continuous Voyage*, 1–28 (1929); Woolsey, "Early Cases on the Doctrine of Continuous Voyage," 4 *A.J.I.L.*, 823 (1910) for material on the early history.

and *Springbok* were only specializations of this settled principle to cargo, a development predictable when a shift from sail to speedier steam power rendered older forms of commercial interdiction of decreasing value to belligerents.

Between the American Civil War and World War I there were no major developments in application of the ultimate destination principle. The *Peterhoff* rule was applied by the Italian Prize Court to arms and ammunition carried by a Dutch vessel from Rotterdam to Djibouti, a French port, from which arms were regularly sent to Abyssinia, with which Italy was then at war.¹⁴³ An abortive attempt was made to apply the rule to *Bundesrath*, *Herzog* and *General*,¹⁴⁴ German mail ships seized by the British while bound for Lourenco Marques, a Portuguese port. The ships were suspected of carrying contraband for the Transvaal and Orange Free State but no contraband was found aboard.¹⁴⁵

As discussed in *Special Situation 7 B*, the distinctions attempted in the Declaration of London, 1909, between absolute and conditional contraband failed to survive World War I. One of the earliest casualties was exemption of conditional contraband from application of the ultimate destination principle unless the shipment of conditional contraband was to a landlocked enemy.

Modern Applications: Ultimate Destination-Continuous Voyage

During World War I, the basic pattern of ultimate destination as outlined by the United States Supreme Court in *Peterhoff* and *Springbok* was reshaped to the conditions of modern general war. Under the London Declaration, ultimate destination could be applied to absolute contraband and this was done by all participants from the beginning of hostilities.

There was also heavy erosion of the Declaration limitation of ultimate voyage as applied to conditional contraband by a series

¹⁴³ *The Doelwijk*, 24 Clunet 850 (1896).

¹⁴⁴ VII Moore, *Digest*, 739 (1906) ("Delagoa Bay Cases").

¹⁴⁵ In *The Tetartos*, I Hurst & Bray, *Russian and Japanese Prize Cases*, 166, 181 (1912) the Russian Supreme Prize Court reversed condemnation of a German vessel carrying railway sleepers from Otaru to Taku, rejecting the doctrine of "continuous voyage" in the process. In *The Carthage*, The Hague Commission refused to pass on an "ultimate destination" issue presented by Italian seizure of a French vessel carrying an aircraft, allegedly contraband, between Marseilles and Tunis. The aircraft was thought destined for Ottoman forces in Tripolitana. Wilson, *The Hague Arbitration Cases*, 353 (1915).

of British and parallel Allied administrative provisions.¹⁴⁶ Application of ultimate destination to conditional contraband by the British Prize Court in 1915;¹⁴⁷ and administrative orders in 1916 placing conditional and absolute contraband upon the same footing for applying the ultimate destination principle;¹⁴⁸ simply applied the *coup de grace* to an already dying distinction.

When ultimate destination was clearly established as applicable to conditional contraband, the Allies shifted their major weight in maritime economic warfare from the equivocal blockade thought by some to have been established by the Reprisals Order-in-Council of 11 March 1915, to contraband controls. The main developments thereafter were the clear shift of the ultimate burden of proof to the claimant in prize proceedings and the increasing range of evidence considered by the prize courts in determining whether a vessel or cargo should be seized or condemned.

Burden of Proof

The absence of a navicert under the "Reprisals" Order-in-Council of 31 July 1940 raised a rebuttable presumption that the ship or cargo had a hostile destination.¹⁴⁹ Although, as previously indicated, no ships or cargoes were condemned during World War II simply because unnavicerted, the burden of proof of innocence of destination was shifted to the claimant to ship or cargo as the case might be. Presumably this practice will continue in any future war in which navicerts are used; although the "clearcerts," issued during the Cuban Quarantine of 1962, the closest approach since World War II to a navicert, were for shipping convenience and had no relation to a burden of proof concerning destination of ship or cargo.

But when navicerts are not used, as in future "limited wars," the issue of burden of proof again can be troublesome. Prior to World War I, the burden of proof of hostile destination rested on the captor.

In Declaration of London, Order-in-Council, No. 1, 20 August 1914, the presumptions of Article 34 of the Declaration of London were continued. However, enemy destination was to be presumed, and thus the burden of proof shifted to the claimant if the goods were consigned to or for an agent of the enemy state, or to or for a

¹⁴⁶ These included the two British Declaration of London Orders-in-Council (1 & 2) (20 August and 29 October 1915) and the "Reprisals" Order-in-Council, 11 March 1915. 108 *Brit. & F. St. P.* (II) 100, 156, 109, 217 (1915).

¹⁴⁷ *The Kim*, /1915/, 215.

¹⁴⁸ Order-in-Council, 30 March 1916, 110 *Brit. & F. St. P.* 173 (1916).

¹⁴⁹ S. R. & O., 1940, No. 1436.

merchant or other person under control of the authorities of an enemy state.¹⁵⁰

This statement of the burden of proof was simplified in Declaration of London Order-in-Council (No. 2) 29 October 1914¹⁵¹ to a presumption of hostile destination if the goods are "consigned to or for an agent of the enemy state." But further presumptions of enemy destination were added if the goods were consigned "to order," if the ship's papers failed to show the consignee, or if the papers showed a consignee in territory belonging to or occupied by the enemy.

When the ultimate destination principle was extended fully in 1916 to conditional contraband, the burden of proof of innocence also was shifted to the claimant. The presumptions of Declaration of London Order-in-Council (No. 2) were continued with the addition of a presumption of enemy destination if the goods were consigned to or for a person who had forwarded during the war imported contraband goods to territory belonging to or occupied by the enemy.

English prize courts recognized these changes in the burden of proof as administratively necessary in general contraband control. Their position was summed up by Lord Parker in *The Louisiana*.¹⁵²

* * * /I/t is well to bear in mind that, according to international law, neutrals may during a war trade freely as well with belligerents as with other neutrals. If, however, the goods in which they trade are in their nature contraband, the traffic involves certain risks. For a belligerent State is entitled to seize the goods in transit on reasonable suspicion that, being in their nature absolute contraband, they are destined for the enemy country, or, being in their nature conditional contraband, they are destined for the enemy government or the enemy naval or military forces.

The goods when seized must of course be brought into the Prize Court for adjudication, but in the Prize Court the neutral trader is not in the position of a person charged with a criminal offense and presumed to be innocent unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure or to displace such reasonable suspicion as in fact exists.

The State of the captors is necessarily unable to investigate the relations between the neutral trader and his correspondents

¹⁵⁰ 108 *Brit. & F. St. P.* (II) 100, Art. 3 (1914).

¹⁵¹ *Ibid.*, 156.

¹⁵² /1918/ A. C. 461, 464.

in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points. If his goods had no such destination as would subject them to condemnation by the Prize Court, it is his interest to make full disclosure of all the details of the transaction.

Only if his goods had such destination can it be his interest to conceal anything or leave anything unexplained. If he does conceal matters which it is material for the Court to know, or if he neglects to explain matters which he is or ought to be in a position to explain, or if he puts forward unsatisfactory or contradictory evidence in matters the details of which must be within his knowledge, he cannot complain if the Court draws inferences adverse to his claim and condemns the goods in question.¹⁵³

Earlier, in *The Kim*, Sir Samuel Evans conceded:¹⁵⁴

* * * It is, no doubt, incumbent upon the captors in the first instance to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants. * * *

From the claimant's point of view, however, the difficulty was that it was not enough for the owner to show the cargo had been shipped innocently, if its ultimate destination in fact was hostile. Also, the facts proved in the first instance by the captor, as described by Sir Samuel, no longer had to be derived from the ship herself.

"Intention" in Enemy Destination

In *The Bermuda*, the United States Supreme Court, citing Sir William Grant in *The William*,¹⁵⁵ declared:¹⁵⁶

* * * If there be an intention, either formed at the time of the original shipment, or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port.

During World War I this point was expanded to exclude the intent of the consignor of the goods as necessarily the decisive

¹⁵³ See *The Antares*, /1915/ II L1.P.C. 219, 251-2; *The Kronprinsessan Margareta*, /1921/ 1 A.C. 486; *The Norne*, /1921/ 1 A.C. 765; *The Falk*, /1921/ 6 L1.L.R. 503; *The Monte Contes*, /1944/ A.C. 6; *The Arsia*, *Ann. Dig.* (1949), 577, Case No. 206 (Enemy Property); *In The Matter of Ten Registered Letters ex Eastbound Aircraft*, *Ann. Dig.* (1949), 583, Case No. 208.

¹⁵⁴ /1915/, 215, 283.

¹⁵⁵ 5 C. Rob. 385 (1806).

¹⁵⁶ 70 U.S. (3 Wall.) 514, 554 (1865).

factor. In *The Pacific*,¹⁵⁷ for example, coffee was consigned from Salvador to an agent in Sweden to dispose of it for the best possible price. Although the consignor had no special intent that the coffee go to Germany, the coffee supply in Sweden was such that Germany was its likely destination. The agent, furthermore, had previously engaged in contraband trade and had acted as intermediary for sending other goods to Hamburg.

In *The Noordam*,¹⁵⁸ cotton goods were shipped from New York to Amsterdam consigned to the Netherlands Oversea Trust Co., for the firm of S. I. De Vries of Amsterdam. The Netherlands Oversea Trust Company was a body of Dutch traders who had agreed with the British Government to act as intermediaries to obtain goods from abroad.

Cotton piece goods were absolute contraband since usable in the manufacture of explosives. It was known De Vries sold large quantities of cotton goods to Germany. While the shipper was innocent and it was known that Netherlands Oversea Trust Co. would have exacted guarantees of neutral consumption from De Vries, it was nevertheless possible that De Vries might evade the vigilance of the Company and ship the goods to Germany. Lord Sterndale stated:¹⁵⁹

* * * The question is, what is the ultimate destination, what is the destination intended by the person who will have control of the goods when they arrive? If they had arrived at the neutral port De Vries would have had the control, subject to this, that they would have had to give undertakings to the Netherlands Oversea Trust Co. that they would not send the goods into an enemy country. But De Vries were the purchasers; they would have become the owners of the goods, and their intention, I have no doubt, was to send them into enemy countries. If that be so, in my opinion it cannot be said that there is not an enemy destination simply because some association, such as the Netherlands Oversea Trust Co., would do all they could to frustrate it. * * *

The goods were condemned as contraband.¹⁶⁰

The German Prize Court applied "ultimate destination" when the

¹⁵⁷ /1920/ L1.L.L.R. 105.

¹⁵⁸ /1919/, 57.

¹⁵⁹ *Ibid.*, 64.

¹⁶⁰ Cf. *The Louisiana*, /1918/ A.C. 461; *The Norne*, /1921/ 1 A.C. 765; *The Castor*, /1921/ 6 L1.L.L.R. 143; *The Charles Racine*, /1946/ L1.P.C. (2d) 215, *Ann. Dig.* (1946), 414, Case No. 179.

shipper and consignee were innocent of intent of hostile destination but the charterer took the cargo to an enemy port.¹⁶¹

In future applications of *The Springbok* rule to attempted breaches of blockade, it may well be that the intention of the owners or shippers of the property to breach blockade will be the material issue upon which condemnation of the property will depend. But while doubt has been shed in *The Monte Contes*¹⁶² upon British practice in World War I relating to the material intent in ultimate destination contraband cases in which condemnation is based on contraband theories rather than breach of blockade, the position taken in *The Noordam* will probably be resumed in any future conflict.¹⁶³

The Noordam position, for example, seems to lie at the heart of contraband cases in which the property is to be reprocessed or manufactured and then pass to the enemy. The problem arose in World War I in *The Balto*.¹⁶⁴

Leather had been shipped in *Balto* consigned to the manager of a Swedish shoe factory. The manager, claimant in the case, declared the leather was intended solely for consumption in the Swedish factory, the evidence being clear nevertheless that it was to be manufactured into boots for the German and Austrian armies. The cargo accordingly was condemned. The consignor was innocent. But the intent of the consignee of the goods (the owner, since title had passed) seemed amply clear to send the manufactured product to the enemy.

In *The Behar*,¹⁶⁵ however, a Swiss consignee, who was shown simply to have had business relations with Germany, lost a cargo of gallnuts by condemnation which were to be manufactured into tannin at its factory. The Franco-Swiss War Trade Agreement was construed not to prohibit the possible export to Germany of tannin extracted from the nuts.

Evidence on the Issue of Enemy Destination

The efficiency of operation of Allied contraband controls in both world wars hinged upon effective gathering of economic intelligence.

¹⁶¹ *The Kiew*, /1917/ 23 *Deutsche Juristen Zeitung*, 640 (1918). See *The Norden*, /1917/ *Grotius, Annuaire International*, 272 (1917); *The Zaanstroom*, /1916/ Fauchille et de Visscher, *Jurisprudence Allemande en Matiere de Prises Maritimes*, 97 (1922-24).

¹⁶² /1944/ A.C. 6, 10.

¹⁶³ And see cases on innocent shipment before hostilities, Fns. 112-113, *supra*, this Chapter.

¹⁶⁴ /1917/, 79.

¹⁶⁵ *Ann. Dig.* (1946), 430 (Conseil des Prises, 1946) Case No. 185.

This intelligence was gathered by censoring the mails, monitoring cable transmission and radio messages and by other covert and overt devices at the disposal of the respective governments.

By the Prize Court Rules of 1914, the customary rule that the ship had "to be condemned out of her own mouth," ignored in *The Springbok*, was also abandoned in British prize procedure. In addition to evidence from the usual sources, such further evidence could be received "as may be admitted by the Judge."¹⁶⁶

Sir Samuel Evans, in *The Kim*¹⁶⁷ remarked in response to objections by counsel to the use of intercepted letters against parties to whom they did not refer:

* * * The letters show an intimate knowledge of what was being done by the various shippers in reference to consignments of foodstuffs to Copenhagen; of the difficulty of exportation from Denmark to Germany; and of the probable fate of some of the cargoes now before the court.

It was objected that they could not be evidence against any persons other than Ascher & Co. and Cudahy & Co., and that they ought not to read in any of the other cases. If they stood alone, I should not act upon them as affecting those cases. But it must be remembered that Prize Courts are not governed or limited by the strict rules of evidence which bind, and sometimes unduly fetter, our municipal courts. Such strict evidence would often be very difficult to obtain, and to require it in many cases would be to defeat the legitimate rights of belligerents.

Prize Courts have always deemed it right to recognize well-known facts which have come to light in other cases, or as matters of public reputation. (Citing Lord Stowell and *The Stephen Hart*) * * *

In discussing the evidence required for seizure of cargo, Lord Parker stated:¹⁶⁸

* * * It is clear that the ultimate as opposed to the ostensible destination of goods would seldom, if ever, appear on the ship's papers or be within the knowledge of the master or crew. It would have to be proved or inferred from other sources, and it could hardly be contended that if the Crown were in possession of evidence obtained from such other sources from

¹⁶⁶ Order-in-Council, 5 August 1914 (Order XV, 2(e)) 109 *Brit. & F. St. P.*, 72 (1915).

¹⁶⁷ /1915/, 215, 250.

¹⁶⁸ *The Baron Stjernblad*, /1918/ A.C. 173, 176.

which an ultimate destination in an enemy country could be inferred as reasonably probable, the seizure of the goods would not be justified. * * *

In *The Consul Corfitzon*¹⁶⁹ where the Privy Council held the President of the Prize Court could make an order for discovery of certain business records of the claimant to cargo, Lord Parker said:

In the present case one of the matters in question is how the appellant intended to dispose of the goods to which these proceedings relate after their delivery at Karlskrona. Were they intended by him for consumption in Sweden, or had they a further destination, and if so in what country?

It appears to their Lordships to be beyond dispute that inferences on this question might properly be drawn from the course and nature of the appellant's business in goods of a similar nature both before and after the outbreak of the present war, and in particular from the volume of his trade with Germany before and since such outbreak. All documents which throw light on these matters must therefore fall within the principle laid down in the case above referred to. * * * /*Compagnie Financiere de Pacifique v. Peruvian Guano Co.* 11 Q.B.D. 55/ * * * The order for discovery being limited to documents which may throw light on the nature and course of the appellant's business and the volume of his trade with Germany for some months before the war and since the outbreak of the war, it is in their Lordship's opinion impossible to hold the order was wrong in law. * * *

The evidence considered by the Prize Courts in determining ultimate destination was varied. As in *The Springbok*, consignments "to order" were thought to raise suspicion,¹⁷⁰ as were failures by ships' papers to name the consignee of cargo.¹⁷¹ Shipments to black-listed firms¹⁷² and to points of active trade in contraband seemed persuasive.¹⁷³ The most interesting group of cases on evidential

¹⁶⁹ /1917/ A.C. 550, 554-555.

¹⁷⁰ In *The Kim*, /1915/, 215, 276, Sir Samuel Evans accepted the position of the United States Supreme Court in *Springbok* on this point although he emphasized suspicion might be dispelled by evidence produced by the shippers. See *The Nieuw-Amsterdam*, /1915/, Fauchille, *Jurisprudence Francaise*, 14; *The Insulinde*, *Ibid.*, 102; *The Gorontalo*, *Ibid.*, 72. As to the use of evidence in World War I see Garner, *Prize Law During the World War*, 535-574 (1927).

¹⁷¹ E.g., *The Ellispontos*, Fauchille, *Jurisprudence Francaise*, 319.

¹⁷² E.g., *The Stanton*, 23 June 1917, Off. Trn. N.; *The Almazora*, /1918/ *Journal Officiel* (27 December 1918).

¹⁷³ The presumption of hostile destination was especially strong when the

points developing from World War I were those in which statistical evidence, derived usually from administrative economic warfare efforts to ration neutrals, was offered to indicate the hostile destination of contraband.

An administrative rationing system was used in both world wars. Rationing in this context means limiting shipments to neutrals based upon statistics concerning their need for local consumption.

During World War I, rationing was commenced in 1915 and became the mainstay of Allied economic warfare. Rationing of neutrals during World War II was reinstituted on 30 July 1940. Navicerts were to be issued sufficient only for their domestic needs.

Thus, while War-Trade Agreements might have limited effect in reducing exports from neutrals to the enemy, constricting their imports by navicerting would limit the ability of the neutral to export everything not produced in quantity locally. Operations against this surplus local production took the form of preemption (buying up the surplus) and barter for goods in local short supply.¹⁷⁴

As statistical evidence developed incidental to administrative rationing, it was logical to use this evidence to determine whether cargoes should be seized as contraband and to condemn cargoes in prize proceedings. During World War II, statistical evidence was used in determining seizures but was not relied upon extensively for condemnations, other evidence usually being adequate for this purpose. In World War I, a number of important statistical evidence cases were decided, although in none were a cargo or vessel condemned on statistical evidence alone.

In *The Kim*,¹⁷⁵ a leading case on many points relating to contraband control in modern war, Sir Samuel Evans dealt with extensive statistical evidence relating to the destination of cargoes on four neutral vessels bound for Denmark. Thus, in considering, the ultimate destination of lard, which formed part of the cargoes, Sir Samuel noted:¹⁷⁶

* * * Some illustrative statistics were given by the Crown, with regard to lard of various qualities, which are not without significance, and which form a fair criterion of the imports of

consignees had prior contacts with the enemy. E.g., *The Tysla*, /1916/ 5 L1.P.C. 433. The Egyptian Prize Court has placed much stress on shipments to Genoa, Italy, as a notorious point for transshipment to Israel. E.g., *Ann. Dig.* (1949) *The Good Hope Castle*, 574, Case No. 204; *The Carbonello*, 581, Case No. 207.

¹⁷⁴ On rationing and preemption, see I Medlicott, *The Economic Blockade*, 515-548 (1952); II Medlicott, *The Economic Blockade*, 129-134, 242-247, 291-313, 323-329 (1959).

¹⁷⁵ /1915/, 215.

¹⁷⁶ *Ibid.*, 222-223.

these and like substances into Denmark before the war; and they give a measure for comparison with the imports of lard consigned to Copenhagen after the outbreak of the war upon the four vessels now before the Court.

The average annual quantity of lard imported into Denmark during the three years 1911–1913 from all sources was 1,459,000 lbs. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000 lbs. Comparing these quantities, the result is that these vessels were carrying towards Copenhagen within less than a month more than thirteen times the quantity of lard which had been imported annually to Denmark for each of the three years before the war. * * *

Although Sir Samuel observed Denmark as a small country, then with a population less than three million, a food exporting rather than importing country and convenient to many German points for transshipment, he considered these features with the statistical evidence merely “important to bear in mind in their appropriate place” and “not in any sense conclusive upon the serious questions of consecutive voyages of hostile quality, and of hostile destination, which are involved before it can be determined whether the goods seized are confiscable as prize.”¹⁷⁷

But as the statistics became both ample and accurate, judges of the Prize Courts became more readily persuaded by them. In *The Pacific*,¹⁷⁸ for example, dealing with coffee shipped to Sweden, Sir Henry Duke declared:¹⁷⁹

* * * Where would these goods have gone? That is the question I have to answer, and I answer it by having regard first to the state of the market. Sweden had been glutted with coffee which had poured into Sweden during the latter months of 1914 and 1915. What was the multiple of the imported quantity to the total consumption, I do not at the moment bear in mind, but it makes a ridiculous sum in arithmetic. The Swedish population could not consume the coffee which was notoriously coming into Sweden, if they had devoted themselves to nothing else but the consumption of coffee. * * *

In *The Urna*¹⁸⁰ dried prunes shipped to Denmark were condemned because of the claimant's failure to carry his burden of proof of innocent destination shifted to him by a statistical table introduced

¹⁷⁷ *Ibid.*, 223–224.

¹⁷⁸ /1920/, 5 L.L.L.R. 105.

¹⁷⁹ *Ibid.*, 106.

¹⁸⁰ /1920/ A.C. 899. See *The Tiber*, /1918/ *Journal Officiel* (17 May 1918), 4356.

in evidence. This table showed imports of dried fruits into Denmark of 18,651 tons in 1915, whereas the annual average of imports before the war during the years 1911–13 was 6,300 tons. In *The Baron Stjernblad*¹⁸¹ statistical evidence concerning importations of cocoa beans into Sweden was held a sufficient basis for seizure, although the beans were not condemned as contraband.

There seemed general agreement on the issue of condemnation of the cargo as prize that if the goods were simply imported into the common stock of the neutral no hostile destination should be implied. This point had been stated by Sir William Grant in *The William*¹⁸² and was adopted by the United States Supreme Court in *The Bermuda*.¹⁸³ Showing that the goods imported, although actually for domestic consumption, released other goods for export, was insufficient to condemn them for hostile destination.¹⁸⁴ Of course, the releases for export would be material to an administrative officer establishing a rationing policy for the neutral.

Exercises of export controls by the neutrals, many of these controls having been established or strengthened pursuant to War-Trade Agreements, were considered by the British Prize Courts as insufficient to rebut presumptions of hostile destination. Although these controls might be applied efficiently and in good faith, it was easy for an enemy's commercial agents to evade them.¹⁸⁵ The French took a more liberal position in World War I but examined neutral export control policy with greater care in World War II.¹⁸⁶ Consignments to semiofficial bodies, usually established under War-Trade Agreements, were held not to preclude hostile destination of the goods consigned.¹⁸⁷

*Differences in Weight of Evidence Required
for Seizure and Condemnation: The Economic
Warfare Importance of Delay*

Prior to a possible prize adjudication, with evidence then taken for a decision to condemn or restore the vessel or cargo, the vessel might

¹⁸¹ /1918/ A.C. 173.

¹⁸² 5 C. Rob. 385 (1806).

¹⁸³ 70 U.S. (3 Wall.) 514 (1865).

¹⁸⁴ *The Bonna*, /1918/, 123. (Coconut oil to be manufactured into margarine possibly releasing butter for export from Sweden to Germany.)

¹⁸⁵ *The Louisiana*, /1918/ A.C. 461.

¹⁸⁶ *The Apollonia*, /1915/ *Journal Officiel* (12 July 1915), 4740; *The Rioja* (No. 2), /1915/, *Ibid.*, (2 December 1915), 8778; *The Sibilla*, /1915/ *Ibid.*, (22 January 1916), 593. Cf. *Ann. Dig.* (1946); *The Nailsea Court*, 425, Case No. 182; *The Mount Taurus*, 427, Case No. 183; *The Nyhorn*, 429, Case No. 184; *The Behar*, 430, Case No. 185.

¹⁸⁷ E.g., *The Orion*, /1921/ 6 L.L.R. 207.

be visited and searched at sea or diverted for a thorough search in a contraband control port. If contraband is found, the vessel or contraband or both may then be seized and in British practice placed in custody of the Marshal of the Prize Court.

Emerging as of great importance in both World Wars I and II was the economic warfare function of diversion and seizure. Although the vessel and cargo might later be condemned, with the evidence previously discussed relevant to the condemnation issue, from the perspective of the officer engaging in economic warfare the delay in transit and possible detention of the property was important.

In both world wars Germany possessed inadequate stockpiles of many materials and seriously underestimated her armaments requirements. Merely disturbing the regularity of flow of critical war materials to a manufacturing establishment suffering shortages will seriously disrupt its manufacturing processes. Indeed, when cargo is condemned, unless it is destroyed or kept within the detaining state by export controls, it may still find its way into the hands of the enemy.

By the English practice, if the goods are seized and then released to the owners, the effect of the release order gives the owner possession of the goods within the realm and thus places them under the aegis of British export controls.¹⁸⁸ Shipping space from England might also be denied the successful claimant. There is no judicial remedy in the Prize Court or in most cases in the ordinary courts for denial of an export license or a denial of shipping space.¹⁸⁹

After property has been seized and is in the custody of the Marshal of the Prize Court, it may also be requisitioned. In *The Zamora*,¹⁹⁰ the conditions for requisition set were: (1) a real question to be tried so an immediate release would not be proper; (2) the vessel or goods must be urgently required for the defense of the realm, the prosecution of the war, or other motives involving national security; and (3) the right must be enforced by application to the Prize Court which determines judicially whether under the particular circumstances the right is exercisable. American and continental practice permits requisitions without these stringent limitations in cases of national urgency.¹⁹¹

¹⁸⁸ See *The Falk*, /1921/ 1 A.C. 787.

¹⁸⁹ See Fitzmaurice, "Some Aspects of Modern Contraband Control and the Law of Prize," 22 *Brit. Y.B. Int. L.*, 73, 74-78 (1945).

¹⁹⁰ /1916/ 2 A.C. 77.

¹⁹¹ As to American decisions and practice, *Ibid.*, 103-105. For the handling of requisition during World War II, see *The Selandia*, *Ann. Dig.* (1938-40), 571, Case No. 218 (South Africa, Supreme Court, In Prize); *The Pomona*, /1939/ L1.P.C. (2d) 1; *Glen Line Ltd. v. Minister of Transport*, *Ann. Dig.* (1949), 569,

In *The Falk*,¹⁹² the Privy Council stated there must be such suspicion to justify seizure as warrants inquiry into the facts and adjudication of them by a properly constituted court. Suspicion is sufficiently raised by the contraband nature of the goods (quebracho and chestnut extracts). Officers seizing the goods are entitled to the benefit of information then possessed by other officers of the Crown or acquired thereafter and are not limited to information from the ship's papers. Statistical evidence was held sufficient as a basis for seizure in *The Baron Stjernblad*.¹⁹³

Even less evidence is required to support the officer directing diversion of the vessel. In *The Bernisse*¹⁹⁴ neutral vessels were diverted for lack of a "green clearance." A green clearance was issued to vessels cleared at a British port of departure or a British port of call.

An Order-in-Council of 16 February 1917 required a vessel be brought in for examination if encountered at sea on her way to or from a port in any neutral country without calling at a port in British or allied territory (emphasis added). The boarding officer found nothing suspicious except lack of a green clearance. The ships did have an *acquit de caution* indicating they had touched at an Allied colonial port.

The boarding officer sought instructions from the Commander of his cruiser. The Commander, in turn, communicated with the Admiral and was ordered by him to take the ships to Kirkwall. This was due to misconstruction of the Order-in-Council, there being no basis for suspicion that the ships were carrying contraband. The court gave restitution with costs. (One vessel had been sunk by a submarine while being diverted and the other heavily damaged.)

The Bernisse was distinguished in *The Mim*.¹⁹⁵ The diversion was there held proper when the vessel was off course and carried a cargo of wheat which was conditional contraband. There was no irregularity in the ship's papers. Sir Francis Hodson stated:¹⁹⁶

* * * /I/n the absence of reasonable suspicion the ship must be allowed to proceed. If she is detained, for example, by mistake, as in *The Bernisse*, or if she is detained for some ulterior reason

Case No. 201. For the reverse situation, release of vessel from requisition for the purpose of seizing in prize, see *The Inginer N. Vlassopol*, *Int. L. Rep.* (1951), 725, Case No. 223.

¹⁹² /1921/ 1 A.C. 787.

¹⁹³ /1918/ A.C. 173.

¹⁹⁴ /1920/, 1.

¹⁹⁵ /1947/, 115.

¹⁹⁶ *Ibid.*, 121.

connected with search, the Crown cannot rely on the belligerent right of visit and search as an answer to the plaintiff's claim. No question of mistake arises. It cannot be said that there was any ulterior object in sending her to Kirkwall, the purpose can, on the evidence, only have been that she might be examined. * * * 197

Once the vessel is diverted a reasonable time is allowed to determine whether the vessel or cargo should be seized. In *The Patrai*¹⁹⁸ a Greek ship was detained for twenty-three days at Weymouth with a part cargo of emery stone. She had come in to Weymouth voluntarily. Her cargo plan, manifests and bills of lading were sent in advance to the Ministry of Economic Warfare in London. Further documents were supplied at the request of the Ministry. The requirements of the Ministry were met on 6 November 1939 but the vessel was not released until 23 November. The claim was for damages for unreasonable detention.

Lord Merriman dismissed the claim, pointing out the complexity of the evidence which must be examined before a seizure could be determined. He stated:¹⁹⁹

* * * /I/t is well settled that where there is probable cause for seizure, the Procurator-General is not to be held liable for bringing the case to adjudication, though unsuccessfully. * * * Moreover, the test of 'probable cause' or reasonable grounds of suspicion is not confined to what was known at the time of the detention, still less to what was then actually known to the individual officers concerned, but what is known by the officers of the Crown generally. * * * But though after-acquired knowledge is available to justify seizure in Prize, arbitrary or capricious arrest, ventured on the hazard that a case for conviction may turn up, may involve liability for damages. * * * But if it is blameworthy to venture on a capricious arrest on the chance that something may turn up, it follows that those with whom rests the decision, on behalf of the Crown, whether to seize or not, must be allowed reasonable time to consider the information on which this decision is to be based. * * *

Emery stone was absolute contraband. It was urgently needed in 1939 by Germany for war purposes. The emery stone on *Patrai*, together with that on another vessel arriving in the Channel at about the same time, was more than one-half of the total emery imports

¹⁹⁷ See *The Regina D'Italia*, /1919/ 9 L1.P.C. 265.

¹⁹⁸ *Int. L. Rep.* (1952), 634, Case No. 148.

¹⁹⁹ *Ibid.*, 635-636.

into Holland in 1938 and three-quarters of the normal imports into Holland from Greece.

Claims were allowed for delay in *The Remonstrant*²⁰⁰ and *The Jurko Topic*.²⁰¹ In *The Remonstrant*, there was an undue delay (about three months) in discharging cargo which was seized even though the master was willing to discharge it. In *The Jurko Topic* a delay in discharge of a contraband cargo of bauxite was due to the difficulty of the Admiralty Marshal in finding a suitable buyer and other administrative complications. The vessel was detained originally at Gibraltar on 16 September 1939 and her cargo was not unloaded until 10 December 1939.²⁰²

Delays in prize proceedings have given rise to no liability on the part of the Crown or Crown officers when the ship or cargo is reasonably suspect. The reasonable time for delay has been extended by the mass of evidence to be considered.²⁰³ However, detention appears to be emerging as an economic warfare weapon, and any incidental governmental expense involved may be fully justified in appropriate cases by the impact upon the industry of an adversary.

Consequences of Carriage of Contraband and Breach of Blockade

The consequences to the owner of contraband cargo were the same in both world wars. The cargo was condemned. It was understood this condemnation was not for violation of international law but was instead simply a sanction open to the belligerent to support his military operations.²⁰⁴ A shipowner acting in good faith might be allowed compensation in lieu of freight for the condemned cargo.²⁰⁵

The effect of carriage of contraband upon the ship depended, according to the older English position formulated by Lord Stowell,

²⁰⁰ /1917/ 3 B. & C. P. C. 14 (P. C. from Sup. Ct. New South Wales).

²⁰¹ /1941/ L1.P.C. (2d) 89, *Ann. Dig.* (1941-42), 631, Case No. 178.

²⁰² See *The Edna*, *Ann. Dig.* (1938-40), 578, Case No. 221; *Estate of Edward A. Breitung v. United States*, *Ann. Dig.* (1941-42), 598, Case No. 174; *The Carbonello*, *Ann. Dig.* (1949), 581, Case No. 207.

²⁰³ See *The Falk*, /1921/ 1 A.C. 787, 794 where Lord Sumner comments upon the change in evidential practice in prize cases as affecting "reasonableness" of the delay. The quebracho and chestnut extracts were detained in April and May 1915. The products were then caught under export licensing and were finally purchased by the War Office in 1917 with the prize proceedings discontinued in 1919.

²⁰⁴ See *The Kronprinsessan Margareta*, /1921/ 1 A.C. 486, 494-498; *The Prins der Nederlanden*, /1921/ 1 A.C. 754, 760.

²⁰⁵ See *The Prins der Nederlanden*, /1921/ 1 A.C. 486; *The Juno*, /1916/, 169; *The Katwijk*, /1916/, 177; *The Glenearn No. 2* /1942/, 50.

upon knowledge by the shipowner of the contraband being carried.²⁰⁶ In *The Hakan*,²⁰⁷ Sir Samuel Evans, dealing with a full cargo of conditional contraband, condemned the vessel, inferring knowledge of the shipowners from the amount of the cargo, although other facts, such as the high rate of hire, also suggested guilty knowledge. Although Article 40 of the Declaration of London was expressly retained when England abandoned the Declaration in 1916, the Privy Council on appeal in *The Hakan* did not stress this Article but stressed the substantial nature of the contraband and special facts from which the owner's knowledge might be inferred.²⁰⁸

In *The Sidi Ifni*²⁰⁹ it was stated the shipowner's knowledge of enemy destination could be inferred if he knew facts which would cause a reasonable person to suspect the destination and yet refrains from making inquiries. The quantitative test set forth in Article 40 of the Declaration of London has virtues as one avoiding inquiries into subjective elements. The Declaration of London principle appears to have been applied by the German Prize Court of Hamburg during World War II²¹⁰ and the French Conseil des Prises in World War I.²¹¹ The Egyptian Prize Court by contrast has applied the knowledge test to condemn a ship carrying about one-tenth contraband in its total cargo.²¹²

Breach or attempted breach of blockade depends on knowledge express or implied of the ship. As pointed out in *Special Situation 7 A*, this knowledge can be inferred by notice to the port from which the ship departs.²¹³ The ship is condemned for breach or attempt to breach blockade. The vessel may be seized at any time before the completion of her voyage.²¹⁴ The cargo on board also is condemned unless it is shown the owners could not have known of the blockade when they placed their goods on board. *The Springbok*²¹⁵ is authority for condemning the goods while releasing an innocent ship.

²⁰⁶ *The Ringende Jacob*, /1798/ 1 C. Rob. 89; *The Neutralitet*, /1801/ 3 C. Rob. 295.

²⁰⁷ /1916/, 266.

²⁰⁸ /1918/ A.C. 148, 156.

²⁰⁹ /1945/ L1.P.D. (2d) 200, *Ann. Dig.* (1943-45), 549, Case No. 197.

²¹⁰ *Ann. Dig.* (1943-45), 573, Case No. 206.

²¹¹ *The Zoodochos-Pighi*, /1916/ Fauchille, *Jurisprudence Francaise*, 313.

²¹² *The Frankisky (No. 1)*, *Ann. Dig.* (1949), 591, Case No. 212.

²¹³ E.g., *The Columbia*, /1799/ 1 C. Rob. 154.

²¹⁴ E.g., *The Welvaart van Pillaw*, /1799/ 2 C. Rob. 128.

²¹⁵ 72 U.S. (5 Wall.), 1 (1866).

Suggested Solution: Special Situation 7 C

There is reasonable suspicion that the ponchos, paint and paint brushes consigned to *Rochambeau et fils* will pass through the hands of this firm to Nuevan or Antiokan forces. This suspicion is grounded upon the nature of the goods (their quantity and susceptibility to military use) and the past relations of *Rochambeau et fils* with Salvaje. Even though the materials are to be completed for military purposes in Guyana or elsewhere, the ultimate destination rule should apply. The rule has now been so well settled that it is no longer open to question whether the ponchos, paint and brushes are regarded as absolute or conditional contraband.

It is doubtful, on the other hand, that there is any reasonable suspicion that the owners of the vessel know the contraband nature of part of the cargo. Nor is there any reason to suspect the vessel intends to breach blockade.

Thus, the Captain of *Tattnall* should not seize the ship but should divert it to the port nearest his current position at which the suspected cargo can be discharged and examined more closely. The cargo may be condemned either as contraband or, under *The Springbok* rule, as cargo shipped with an intent to breach blockade.

A route should be prescribed for *Truant* and periodic checks made on her progress to her port of diversion by naval air. If the Captain of *Tattnall* desires suggestions of ports for diversion, these will be furnished at his request. If necessary, personnel will be flown from OAS Economic Measures Command to inspect the cargo and to determine whether or not it will be seized at the port to which diversion is ordered. The cargo is considered too large for transshipment at sea.

E. MARITIME ENEMY PROPERTY CONTROL

Special Situation 7 D

You are Captain of U.S.S. *Tattnall*. Radio reports received by *Tattnall* this morning indicate Scythia has launched ground and air attacks on the NATO member described in *General Situation 7*. Twenty-five Scythian divisions have been identified in the ground action. No United States ground or air units have been committed. There have been no attacks upon United States ground or air units or upon the United States Sixth Fleet. The Security Council of the United Nations is in emergency session as is the National Security Council of the United States.

This morning you intercepted the Scythian freighter, *Frolic*.

Your boarding officer found 200 tons of tin ingot aboard as her only cargo. The tin was shipped by *Rochambeau et fils* of Georgetown, Guyana. A Nuevan supercargo on board has told your boarding officer that the tin is shipped under a c.i.f. contract made by *Rochambeau et fils* as agent for the Nuevan Ministry of Resources, a Department of the Nuevan Government, with Vulcan Metals Company of Parnassus, Corinthia. The tin was shipped from Nueva to Guyana prior to establishment of the blockade. A copy of the bill of lading indicates the shipment is "to order" of *Rochambeau et fils*. Consideration for the sale includes the 20,000 ponchos, paint and paint brushes shipped on M.S. *Truant*, a Corinthian freighter, diverted by you yesterday as described in *Special Situation 7 C* and \$20,000 (U.S.). *Frolic* is bound from Georgetown, Guyana, to Parnassus, Corinthia.

You have attempted to contact OAS Economic Measures Command without success. You believe it unlikely radio contact will be made in the next six hours. Will you capture *Frolic*, divert her, or permit her to pass?

Discussion: Special Situation 7 D

By the Declaration of Paris, 1856, a neutral flag covers enemy's goods with the exception of contraband of war; and neutral goods with the exception of contraband of war are not liable to capture under the enemy flag.²¹⁶ Tin is not on the contraband list proclaimed by the Organization of American States as described in *Special Situation 7 C*. There is no evidence that either the ship or the goods have broken blockade. The basis for capture, diversion or such other action the Captain may deem necessary must turn: (1) upon the character of the Scythian ship—whether it is to be treated as neutral or enemy; and, (2) upon the ownership of the cargo, i.e., whether the tin is either still owned by the Nuevan government or whether it is so closely associated with it that the tin must be treated as if it were owned by the enemy.

Character of the Ship

Under Articles 5 and 6 of the NATO Treaty,²¹⁷ an attack by Scythia upon a NATO member is deemed an attack upon the United States. Consequently, without a formal declaration of war the United States is entitled to regard Scythia as an enemy even

²¹⁶ See *Naval War College, International Law Topics and Discussions*, 1905, 109.

²¹⁷ 63 Stat. 2241 (1949).

though attacks have not yet been directed against United States units.

An enemy vessel on the high seas is subject to capture without notice of hostilities. The United States is not a party to Hague Convention VI (Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities). Article 3 of this Convention provides the vessel can be detained but not confiscated. It is also uncertain that Scythia is a party to this Convention and doubtful that it will be applied by any combatants in the hostilities beginning.

Had *Frolic* been in the harbor of an adversary at the commencement of hostilities, days of grace might have been granted for departure. The United States gave days of grace in the Spanish-American War but not in World Wars I and II.²¹⁸ State practice varies in the matter.²¹⁹

Frolic does not fall into any of the categories of vessels exempt from capture by custom or convention. The major exempted categories are hospital and cartel ships.²²⁰ The treatment meted out to fishing boats and small boats engaged in local trade has been discussed previously in this chapter.²²¹

The character of *Frolic* as neutral or enemy is determined primarily by the flag she is entitled to fly.²²² Prize Courts will go beyond the flag and inquire into the real character of the vessel when there is suspicion that the flag is spurious, where the papers are irregular, or where the registered owner is only nominal. The vessel may be found controlled by the enemy rather than by

²¹⁸ For the Spanish-American War position, see *The Buena Ventura*, 175 U.S. 384 (1899).

²¹⁹ The British regard the matter was one of grace and not of right. *The Marie Leonhardt*, /1921/, 1. In *The Blonde*, /1922/ 1 A.C. 313 the Privy Council took the position that the vessels could be allowed to leave but if detained could not be confiscated under Hague Convention VI. The vessels could be detained with a duty to restore or requisitioned with a duty to compensate. However, in 1925 England denounced Convention VI. See *The Pomona*, /1943/, 24.

²²⁰ See *Geneva Convention, Wounded and Sick in Armed Forces in the Field* (1949), Arts. 36-37 (medical aircraft); *Geneva Convention, Wounded and Shipwrecked Members of the Armed Forces at Sea* (1949), Art. 21 (private vessels used for transport of wounded), Arts. 22-28 (hospital ships and medical transports). A cartel ship sails under safe conduct or pass. See *The Daifjie*, /1800/ 3 C. Rob. 139.

²²¹ See Fns. 58-59 and cases there cited where the matter is discussed as exceptions to blockade.

²²² The principle is stated in Art. 57 of the London Declaration, 1909. See *The Unitas*, /1950/ A.C. 536. If the ship flies an enemy flag there must be exceptional circumstances to avoid condemning the vessel.

the nominal owners.²²³ Article 5 of the Geneva Convention on the High Seas²²⁴ is likely to have little effect upon determinations of enemy or neutral character. The Prize Courts seek not only a "genuine link" between the ship and its flag state but actual control of the ship by states other than the flag state. It is the actual control, not the flag that ultimately determines enemy character for prize purposes.

Frolic apparently is a state-owned vessel. Ownership at the time of seizure is critical. The rule is the same for ships and cargoes.²²⁵ The status of lienholders is immaterial.²²⁶

Although no transfers of title to *Frolic* seem in issue, transfers during wartime are examined closely and if merely colorable, rather than *bona fide*, divesting the enemy of all interest, the transfer will be declared invalid.²²⁷ An attempt was made in the London Declaration, 1909, to establish an absolute presumption, subject to certain conditions stipulated, of validity of the sale if made more than thirty days prior to commencement of hostilities.²²⁸ The Declaration also set forth a presumption that a transfer was void if made during a voyage or in a blockaded port, if a right to redemption or reversion was retained, and if the requirements of the new flag state have not been observed. Otherwise the presumption could be rebutted by proof that the transfer was not to avoid the consequences of enemy character.²²⁹

The London Declaration formula was rejected by the British in World War I in *The Tommi*;²³⁰ and although applied by France in *The Dacia*,²³¹ France later returned to its position that a transfer after war began was void.

²²³ E.g., *The St. Tudno*, /1916/, 271; *The Michigan*, /1916/ 5 L.I.P.C. 421; *The Hamborn*, /1918/, 19 Cf. *The Nordmeer*, *Ann. Dig.* (1946), 401, Case No. 172 (no papers on vessel). The United States has emphasized the flag as determining nationality, but has not dealt with prize cases involving this problem since the Spanish-American War. See *The Pedro*, 175 U.S. 354 (1899).

²²⁴ *TIAS* 5200.

²²⁵ E.g., *The Rijn*, /1917/, 145 (Cargo); *The Tommi*, (1914), 215 (Ship).

²²⁶ *The Konsul Hendrik Fisser*, /1940/ L.I.P.C. (2d) 16, *Ann. Dig.* (1938-40), 561, Case No. 215; *The Odessa*, /1916/ 1 A.C. 145; *The Marie Glaeser*, /1914/, 218.

²²⁷ *The Sechs Geschwistern*, /1801/ 4 C. Rob. 100; *The Kankakee*, /1918/ 8 L.I.P.C. 74; *The Benito Estenger*, 176 U.S. 568 (1900). By the French practice, any transfer prior to war was recognized and any transfer after war began was not. *The Victoire (ex Virginia)* /1920/ *Journal Officiel* (16 January 1921), 651.

²²⁸ See *Naval War College, International Law Topics*, 1909, 123, Art. 55.

²²⁹ *Ibid.*, 125, Art. 56.

²³⁰ /1914/, 215.

²³¹ /1915/ *Journal Officiel* (28 September 1915), 6912.

Since *Frolic* flies a Scythian flag, and there is no apparent problem concerning transfer of title to her, she is subject to capture as an enemy vessel. If the Captain of *Tattnall* captures *Frolic* and places a prize crew aboard her, this answers his problem of diversion and he has then no concern about the cargo. The cargo will be restored or condemned by the Prize Court.

There are reasons why he might prefer some other basis for diversion of *Frolic*. To capture *Frolic*, he should place a prize crew on board to prevent her rescue by another Scythian vessel.²³² This may unnecessarily reduce the strength of his vessel at a time when he may be directed upon more active naval warfare missions due to the impending military operations against Scythia.

He is also enforcing contraband regulations for the Organization of American States. Capture of the Scythian vessel as an enemy vessel may unnecessarily involve the Organization in United States action as a NATO member.

The United States position *vis-à-vis* Scythia and NATO has not been delineated by the President; and until the President acts, the Captain of *Tattnall* should not create a situation which will limit the President's freedom of maneuver. The factual matrix is within the control of the Captain of *Tattnall*.

Character of the Cargo

There is a strong presumption that if the ship is an enemy it also carries enemy cargo.²³³ According to Article 59 of the London Declaration, 1909,²³⁴ this presumption can be rebutted by proof of neutral character of the goods. Permitting the presumption to be rebutted is consistent with Article 3 of the Declaration of Paris, 1856, which states neutral goods with the exception of contraband of war are not liable to capture under the enemy flag.²³⁵ The rebuttal presumption of enemy character of goods has been applied consistently by the Prize Courts.²³⁶

The presumption is useful, however, to the Prize Court which

²³² However, the ship may be captured without putting a prize crew on board. *The Hercules*, /1819/ 2 Dods., 353 (taken by *ruse de guerre*); *La Esperanza*, /1822/ Hagg., 85.

²³³ E.g., *The Roland*, /1915/ 1 B. & C.P.C., 188.

²³⁴ See *Naval War College, International Law Topics*, 1909, 135.

²³⁵ See *Naval War College, International Law Topics and Discussions*, 1905, 109.

²³⁶ *The Sahda*, /1915/ *Journal Officiel* (10 September 1916), 8072; *The Moravia* (No. 2), /1916/ *Gazetta Ufficiale* (29 May 1916) No. 126; *The Este* (Cargo ex) *Ann. Dig.* (1943-45), 511, Case No. 180 (Prize Court of Curacao, D.W.I.).

ultimately passes upon the disposition of the cargo, and not to the officer capturing the vessel initially based upon its enemy character. Since it may be desirable for the Captain of *Tattnall* to avoid a position that *Frolic* presently is an enemy vessel, although she certainly has that status, at the same time he should not permit such a vessel to pass but should insure that her enemy status and character of her cargo are subject to adjudication and especially that a metal of such strategic importance as tin will not pass into Scythian hands. Consequently, a possibly useful approach in solving his problem is to consider the character of the cargo and use the cargo as a basis for diversion of the ship.

Enemy character of the cargo is determined by the enemy character of its owner.²³⁷ How the enemy character of the owner is determined is a complex matter to which various tests have been applied by belligerents. The only exception to determining the enemy character of the cargo by the enemy character of the owner is made for the produce of enemy soil. The produce of the enemy soil remains enemy even if the owner is neutral.²³⁸

The various tests for enemy character of a natural person who owns the cargo in question turn either upon domicile or nationality. The preferred continental test has been nationality.²³⁹ The preferred British and American test has been domicile.²⁴⁰

Domicile is a question of fact depending upon residence of the person and his concomitant intent at the time of taking up residence to make the place his permanent home. A national thus permanently resident in an enemy country is presumed an enemy for treatment of cargo owned by him.²⁴¹ He may unequivocally abandon his enemy domicile and be treated as a neutral. The same general test applies to changes of registration of a ship and

²³⁷ This basic point was made in the Declaration of London, 1909, Art. 58, but no tests for enemy character of the owner were attempted. See *Naval War College, International Law Topics, 1909, 133*.

²³⁸ E.g., *The Marine Cap*, *Ann. Dig.* (1949), 570, Case No. 202 (Prize Court of Alexandria) (Lemons); *The Asturian*, /1916/, 150 (sultanias); *The Amy Warwick* (The Prize Cases), 67 U.S. (2 Black), 635 (1862) (tobacco). It may be possible to extend this theory to minerals although the cases reported involve agricultural products.

²³⁹ E.g., *Le Hardy*, /1801/ I Pistoye et Duverdy, *Traits des Prises Maritimes*, 321 (1855); *The Martha-Bockhahn*, /1919/ *Journal Officiel* (2 March 1919), 2348; *The Ambra* (No. 2) /1916/ *Gazetta Ufficiale* (12 July 1916) No. 163; *The Lestris*, /1917/ *Grotius, Annuaire International*, 191 (1918) Claim 11.

²⁴⁰ *The Anglo-Mexican*, /1918/ A.C. 422; *The William Bagaley*, 72 U.S. (5 Wall.) 377 (1866).

²⁴¹ See *The Anglo-Mexican*, /1918/ A.C. 422.

domicile of its owner.²⁴² Territory in enemy occupation is treated as enemy territory for the domicile test.²⁴³

In addition to the civil domicile of the natural person, there also is commercial domicile relevant both to the character of his cargo and to the character of his ship. There is likewise a possibility that a neutral domiciliary may be associated with an enemy house of trade.

A natural person acquires commercial domicile by residence, even for a short period, plus trade with an enemy country making this trade a part of its resources. No fixed establishment in the enemy country is necessary.²⁴⁴

If the owner does not reside in the enemy country, he may nevertheless be affiliated with an enemy house of trade. For a reasonable period after the war commences the owner is given an opportunity to disassociate from his house.²⁴⁵ He must bear the burden of proof of disassociation.²⁴⁶ If he fails to disassociate, his interest in cargo transported on behalf of the house of trade is subject to condemnation.²⁴⁷ The house of trade rule has been extended to the corporate enemy subsidiary of a neutral parent corporation.²⁴⁸

The domicile of corporations owning cargo or ships has caused much confusion. The basic difficulty lies in the fact that in economic warfare it is not the place of incorporation or the place of doing business but the control over the corporation that is significant. There have been no United States prize cases in which the domicile of a corporation as owner of ship or cargo subject to condemnation has been in issue. However, in other questions in which possible enemy control might exist over the corporation, the United States has treated a corporation as an American national although the Alien Property Custodian will vest shares owned by alien enemies.²⁴⁹ There has been a tendency in freezing and

²⁴² See *The Inginer N. Vlassopol*, /1951/ 1 L.I.P.C. (2d), 307, *Int. L. Rep.* (1951), 725, Case No. 223 (involuntary residence of owner).

²⁴³ *The Amy Warwick* (The Prize Cases) 67 U.S. (2 Black) 635 (1862).

²⁴⁴ *The Kara Deniz*, /1922/ 3 B. & C.P.C., 1070; *The Frances*, 12 U.S. (8 Cranch.) 335 (1814).

²⁴⁵ *The Vigilantia*, /1798/ 1 C. Rob. 1.

²⁴⁶ *The Manningtry*, /1916/, 329.

²⁴⁷ If the owner has interests in two or more houses of trade, one being an enemy and the affairs are confused, all of the property may be condemned unless the claimant can bear the burden of distinguishing neutral from enemy property. *The Posteiro*, /1917/ 3 B. & C.P.C., 275.

²⁴⁸ *The Glenroy (Cargo ex)* (No. 2), /1945/ L.I.P.C. (2d) 191, *Ann. Dig.* (1943-45), 365, Case No. 123.

²⁴⁹ 50 U.S.C. Sections 2, 7, 12, 616. *Silisian-American Corp. v. Clark*, 322 U.S. 469 (1947).

blacklisting procedures to consider the actual control over the domestic corporation.²⁵⁰ It is possible that in a prize case involving a question of enemy character of a domestic corporation, the Prize Court might inquire into actual control of the corporation by the enemy.

In *Daimler Co., Ltd. v. Continental Tyre and Rubber Co., Ltd.*,²⁵¹ the House of Lords held a company *prima facie* a friend when registered in England. The company could assume enemy character if persons in *de facto* control of its affairs were either residents in enemy territory or controlled by the enemy. *Daimler* was applied by the Prize Court in the *St. Tudno*,²⁵² in which the directors of a domestic company were under enemy control, and *The Hamborn*,²⁵³ in which the domestic company was a subsidiary of a German-controlled corporation. In *The Michigan*²⁵⁴ all of the shareholders of the corporation were enemy persons except the holder of one share who was a French former German resident. The corporation was held to have enemy character.

The enemy character of the owner of the tin on *Frolic* is simplified because the Nuevan Ministry of Resources is an administrative department of the Nuevan Government. Nueva is now under blockade and contraband regulations are being enforced against her. Although no war has been declared formally, military enforcement measures are being taken against her. She should be regarded as an enemy until these are discontinued. The question remains whether the Nuevan Ministry now owns the tin or whether Vulcan Metals Company owns it.

A c.i.f. contract is one in which the amount to be paid by the buyer covers the invoice figure of the goods and insurance and freight to a designated terminus. An f.o.b. contract may be to the place of shipment, to carrier or to destination, the seller bearing the expense of shipment and insurance to the point indicated. When title to property (the *jus disponendi*) passes under these contracts depends upon the terms of the particular agreement.

Under the Uniform Commercial Code, now widely adopted in the United States, title (risk of loss) under a c.i.f. contract passes to the buyer upon shipment if the seller has properly performed all of his obligations with respect to the goods.²⁵⁵ Under the British

²⁵⁰ See Domke, *Trading With the Enemy in World War II*, 120-144, (1943).

²⁵¹ /1916/ 2 A.C. 307.

²⁵² /1916/, 291.

²⁵³ /1918/, 19.

²⁵⁴ /1916/ 5 L1.P.C., 421 (distribution of the shares is described in *The Poona*, /1915/ 2 L1.P.C., 291.

²⁵⁵ UCC—Section 2-230.

Sale of Goods Act, 1893, the intention of the parties to the contract concerning passage of the property is emphasized;²⁵⁶ but under c.i.f. contracts the position preferred seems to be the *jus disponendi* remains in the seller until actual release of the documents to the buyer and his acceptance of them.²⁵⁷ In continental practice much emphasis has been placed upon the bills of lading as indicating the passage of title.²⁵⁸

United States Courts have had no occasion to construe a c.i.f. contract in a prize case. By the British practice a distinction is made depending upon whether all the material parts of the business transaction (apparently both the contract and shipment) take place during war or in anticipation of war or whether, on the other hand, the material parts of the business transaction occur during peace and unanticipated war intervenes.

For transactions prior to war and not in anticipation of it, the British have applied their municipal law, although it has been indicated that if the contracting parties intend some other law to govern their transaction, the law intended will be applied.²⁵⁹ The intention of the parties as to whether the buyer or seller has the *jus disponendi* at the time of seizure will be the material factor under British law.

In *The Miramachi*²⁶⁰ wheat was shipped from Galveston to Germany before outbreak of war under a c.i.f. contract. A bill of exchange was drawn by the sellers upon the buyers accompanied by an unendorsed bill of lading and certificates of insurance to be delivered to the buyers upon payment. The buyers did not accept the bill of exchange. Sir Samuel Evans held there was no intention to transfer the property (the *jus disponendi*) until the bill of exchange was accepted. The property was restored as neutral property.

When the sale transaction is entered into in contemplation of war or during hostilities, title passes only upon actual delivery of the goods to the buyer. A mere transfer of documents is insufficient to bind the captor, the property being subject to capture as enemy property so long as it remains *in transitu*.²⁶¹ If the consignor is neutral, property consigned to the enemy is presumed delivered to

²⁵⁶ 56 & 57 Vict., c. 71 Sections 17, 18.

²⁵⁷ See Stone, *Legal Controls of International Conflict*, 475 (2d Ed., 1959).

²⁵⁸ E.g., *The Kyzicos*, /1916/ *Gazetta Ufficiale* (24 May 1916) No. 122.

²⁵⁹ *The Parchim*, /1918/ A.C. 157, 161.

²⁶⁰ /1915/, 71. Cf. *The Parchim*, *op. cit.* See *The Gabbiano*, /1940/, 166; *The Glenroy* (No. 2), /1943/ L.I.P.C. (2d), 153, on appeal, /1945/ A.C. 124.

²⁶¹ *The Vrow Margaretha*, /1799/ 1 C. Rob. 336; *The Baltica*, /1857/ 11 Moo. P.C. 141; *The Kronprinsessan Margareta*, /1921/ 1 A.C. 486; *The Glenearn* (*Cargo ex.*) /1941/, 51.

him upon capture. The intents of the parties under the contract do not control.²⁶²

When these rules are applied to goods allegedly shipped in contemplation of hostilities, the burden lies on the claimant to prove the transaction was *bona fide*. The claimant might be able to show, for example, that the contract was made when no hostilities were foreseen;²⁶³ or that the hostilities apprehended were between states other than those of the contracting parties.²⁶⁴

The war-peace dichotomy in British practice apparently has had no influence in continental prize jurisprudence, the question in continental Prize Courts turning upon the intention of the parties no matter when the transaction occurred. The bills of lading, as pointed out, carry great weight on the issue of intention.²⁶⁵ Neither the British nor the continental courts recognize transfers after the property is seized or captured.²⁶⁶

While the actual ownership of the tin on *Frolic* cannot be determined without prize proceedings, the c.i.f. contract, coupled with the fact that the bill of lading is to order, and that payment for the cargo has probably not been received by the Nuevan agent, indicate the *jus disponendi* to the property has not passed to Vulcan Metals Company. The cargo thus remains enemy property. The contract and shipment were also made after enforcement action by the Organization of American States commenced. Thus the transfer might be brought under the British rule treating transfers of title ineffective while the property is *in transitu*.

The problem remains that if *Frolic* is regarded as a neutral ship, the enemy property aboard her falls under Article 2 of the Declaration of London, 1856. The tin is not on the contraband list, and the Declaration states a neutral flag covers enemy goods except contraband of war.

The problem is to detain *Frolic* without detaining her as an enemy. A Prize Court may treat her as an enemy vessel when our national policy concerning Scythia is fully clarified. Two approaches may be taken upon which a diversion of *Frolic*, other than as an enemy vessel, can be based.

It may be reasoned, first, that Article 2 of the Declaration of

²⁶² *The Sally*, /1795/ 3 C. Rob. 300n.-302; *The Louisiana*, /1916/ 5 L1.P.C., 230, /1918/ A.C. 461.

²⁶³ *The Southfield*, /1915/ 1 B. & C.P.C., 332.

²⁶⁴ *The Daksa*, /1917/ A.C. 386.

²⁶⁵ See Colombos, *Law of Prize*, 92-94 (1940) and cases there cited.

²⁶⁶ E.g., *The Palm Branch*, /1916/, 230; *The Mercia*, /1939/ *Ann. Dig.* (1943-45), 564, Case No. 203 (Germany, Prize Court of Hamburg); *The Good Hope Castle*, /1949/ *Ann. Dig.* (1949), 574, Case No. 204.

Paris was intended to protect goods in the ordinary course of commerce and not goods shipped on a neutral ship expressly to obtain protection of the neutral flag. Such an argument was successful in *The Bawean*²⁶⁷ in which tea had been transshipped from a German to a Dutch vessel during hostilities for carriage between Padang to London to be sold through a firm of brokers.

Unneutral service of the vessel also may be a basis for diversion. Although *Frolic* has not been supplying enemy warships or land forces directly, the tin is carried as exchange for ponchos, paint and brushes believed destined for Salvaje's forces.²⁶⁸ Also *Frolic* carries a Nuevan supercargo who might be regarded as a Nuevan governmental official.²⁶⁹ Both are rather weak grounds for unneutral service as a basis for condemnation of the vessel but are sufficient bases for suspicion justifying a diversion.

No diversion can be founded simply upon the enemy "origin" of the tin. Allied controls of enemy exports during World Wars I and II were based on reprisal orders. The reprisal Order-in-Council, 11 March 1915,²⁷⁰ provided for interdiction of all property "laden" at a German port and for goods "which are of enemy origin or are enemy property." Goods laden in a German port if not requisitioned were to be detained or sold; although proceeds of sale were not to be paid until the conclusion of peace except upon application of a proper officer of the Crown. Upon application of this officer, neutral property could be recovered. A similar scheme was applied to property of enemy origin laden at a port other than a German port. A reprisal Order-in-Council in 1939²⁷¹ reinstituted similar controls. The order was subsequently extended to other belligerents.

These orders were framed as reprisals largely because of the limitations placed by Article 2 of the Declaration of Paris, 1856, upon noncontraband enemy goods carried under neutral flags. "Certificates of Origin and Interests," certifying goods as free from enemy taint could be obtained from consuls in various ports. In 1940, certificates of origin and interest were made semicompulsory. Goods shipped from a port giving access to the enemy were presumed to be of enemy origin or ownership absent the certificate. During World

²⁶⁷ /1918/, 58.

²⁶⁸ There are no cases on indirect service to the enemy. However, the tin is a full cargo and in exchange for property which is for the use of enemy forces and absolute contraband. The law of unneutral service is in flux and such an argument might be received favorably by a Prize Court.

²⁶⁹ See *The Orozembo* /1807/, 6 C. Rob. 430.

²⁷⁰ 109 *Brit. & F. St. P.*, 217 (1915).

²⁷¹ S. R. & O., 1939, No. 1709.

War II, the export control program was administered by an Enemy Export Committee in the Ministry of Economic Warfare.²⁷²

Suggested Solution: Special Situation 7 D

Frolic should be diverted to a United States port on the ground she carries as her total cargo enemy goods shipped during hostilities with the special intent to use the cover of a neutral flag. The master should also be informed that he is suspected of unneutral service in transporting a Nuevan supercargo. No prize crew should be placed aboard *Frolic*. However, a route should be assigned her and periodic reports made on her progress by naval air. If *Frolic* deviates from her route, she may be seized. She could be captured at any time as an enemy vessel; but her enemy character is preferably left in suspense until United States policy concerning the Scythian attack upon our NATO ally is determined.

²⁷² See I Medlicott, *The Economic Blockade*, 112-124 (1952) for a discussion of World War II problems.

APPENDIX A



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